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No. 87-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLSTATE INSURANCE CO.,
Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTIONS PRESENTED

1. Whether the imposition of a $3,500,000 punitive damage award violates the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment because the amount of that penalty was established and upheld on the basis of vague, shifting standards and is grossly disproportionate to the compensatory damages awarded and to monetary punishments inflicted by the Arizona legislature for similar or more egregious conduct.

2. Whether a defendant in a civil action must receive some or all of the federal constitutional protections accorded to defendants in criminal cases before punitive damages can be imposed.

3. Whether the Due Process Clause of the Fourteenth Amendment requires that liability for punitive damages be established by clear and convincing evidence before such damages may be awarded in a civil action.

4. Whether the Due Process Clause of the Fourteenth Amendment requires the application to pending cases of a decision by this Court that the Eighth Amendment applies to punitive damage awards and the application to this case of a decision of the Supreme Court of Arizona requiring that the entitlement to punitive damages be established by "clear and convincing" evidence.*

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* All parties to this case are as named in the caption. Pursuant to Rule 28.1 of the Rules of the Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries and affiliates of petitioner: Allstate Insurance Company is the wholly owned subsidiary of Sears, Roebuck & Co.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Facts Relevant to Petitioner's Constitutional Questions	4
B. The Presentation of the Federal Questions	9
REASONS FOR GRANTING THE WRIT	15
A. Jurisdiction	16
1. *The Asserted Basis for Refusal To Reach the Federal Questions Is an Inadequate State Ground and Does Not Defeat This Court's Jurisdiction*	16
2. *Alternative Basis Requiring Decision of Petitioner's Federal Questions by the Supreme Court of Arizona*	18
B. The Questions Presented Are Important, Recurring Questions of Federal Constitutional Law That Should Be Settled by This Court	21
1. *The Excessiveness of the $3,500,000 Punitive Damage Award*	21
2. *The Question Whether Punitive Damages May Be Imposed Without According Federal Constitutional Protections Due to Defendants in Criminal Cases Should Be Decided by This Court*	24

3. *The Question Whether Punitive Damages May, Under the Due Process Clause of the Fourteenth Amendment, Be Imposed Only After Liability Is Demonstrated by "Clear and Convincing" Evidence Should Be Resolved by This Court* 25

4. *This Court Should Decide Whether the Punitive Purposes Advanced by Punitive Damage Awards Require That Rules Restricting Their Imposition Be Applied to Cases Pending on Appeal* 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Addington v. *Texas*, 441 U.S. 418 (1979) 26

Aetna Life Insurance Co. v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986) 10, 15

Bankers Life and Casualty Co. v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987), 107 S. Ct. 1367 (1987) 1, 15, 22, 27

Barr v. *City of Columbia*, 378 U.S. 146 (1954) 17, 18

Barrio v. *San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984) 16

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673 (1930) 20

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) ... 28

Electrical Workers v. *Foust*, 442 U.S. 42 (1979) 24-25

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 22, 25

Giacco v. *Pennsylvania*, 382 U.S. 399 (1966) 23

Griffith v. *Kentucky*, 107 S. Ct. 708 (1987) 27, 28, 29

Henry v. *Collins*, 380 U.S. 356 (1965) 28

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 24

Kolender v. *Lawson*, 461 U.S. 352 (1983) 23, 27

Linthicum v. *Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) ..... *passim*

Maricopa County v. *Corporation Commission of Arizona*, 79 Ariz. 307, 289 P.2d 183 (1955) 14, 18

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 27

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 28

Rawlings v. *Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986) 4, 9, 10

Table of Authorities Continued

	Page
Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971)	25
Ruth v. *Industrial Commission*, 107 Ariz. 572, 490 P.2d 828 (1971)	16
Santosky v. *Kramer*, 455 U.S. 745 (1983)	26
Smith v. *Wade*, 461 U.S. 30 (1983)	25, 26
State v. *Yslas*, 139 Ariz. 60, 676 P.2d 1718 (1984)	19
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969)	18
Town of South Tucson v. *Board of Supervisors*, 52 Ariz. 575, 84 P.2d 581 (1938)	16
Travelers Indemnity Co. v. *Armstrong*, 442 N.E. 2d 349 (Ind. 1982)	26
Tuttle v. *Raymond*, 494 A.2d 1353 (Me. 1985)	26
United States v. *American Railway Express Co.*, 265 U.S. 425 (1924)	18-19
United States v. *Ward*, 448 U.S. 242 (1980)	24
Wangen v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437 (1980)	26
FEDERAL CONSTITUTION AND STATUES:	
Constitution:	
Fifth Amendment	24, 25
Sixth Amendment	24, 25
Eighth Amendment	*passim*
Fourteenth Amendment	*passim*

Table of Authorities Continued

Page

Statutes:

28 U.S.C. § 1257(3) 2, 15

STATE STATUTES AND RULES:

Arizona:

Ariz. Rev. Stat. Ann. § 13-803 (Cum. Supp. 1986) 21

Ariz. Rev. Stat. Ann. § 13-804 (Cum. Supp. 1986) 21

Ariz. Rev. Stat. Ann. § 13-2202 (1978) 21

Rule 404(a), Ariz. R. Ev. 7

Rule 404(b), Ariz. R. Ev. 7, 10

Other States:

Act of the State of Alabama, H. 27, § 1 (June 9, 1987) 26

Alas. Stat. § 09.17.020 (Supp. 1986) 26

Colo. Rev. Stat. Ann. § 13-25-127(2)(Supp. 1986) 26

Fla. Stat. Ann. § 768.73 (Supp. 1987) 26

Minn. Stat. Ann. § 549.20 (Supp. 1987) 26

Mont. Code Ann. § 27-1-221(2)(1986) 26

Okla. Stat. Ann., Title 23, § 9 (1987) 26

Ore. Rev. Stat. Ann. § 30.925 (1983) 26

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ALLSTATE INSURANCE CO.,

Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Allstate Insurance Company petitions the Court to issue a Writ of Certiorari to the Supreme Court of Arizona to review four questions raised by that court's reinstatement of a $3,500,000 punitive damage award against petitioner. One of those questions is presently *sub judice* in this Court in *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987), 107 S. Ct. 1367 (1987). Petitioner seeks review of three additional questions not presented in *Bankers Life* which also impact broadly on the manner in which punitive damage awards designed to fulfill the classic objectives of the criminal law—punishment and deterrence—are imposed in civil litigation throughout the United States.

OPINIONS BELOW

The February 26, 1987 opinion of the Supreme Court of Arizona, with dissenting opinion, is reprinted in the Appendix, App. 1a-33a, and is reported at 733 P.2d 1073 (1987). The opinion of the Court of Appeals of Arizona, Division One, of August 13, 1985 is reprinted *infra*, App. 34a-47a, and is unreported. The memorandum opinion and order of the Superior Court of Arizona in and for the County of Maricopa is reprinted *infra*, App. 48a-50a, and is unreported. The order of the Supreme Court of Arizona denying petitioner's Motion for Reconsideration, issued on April 7, 1987, is reprinted *infra*, App. 51a, and is unreported.

JURISDICTION

Petitioner seeks review of the February 26, 1987 decision of the Supreme Court of Arizona which vacated the decision of the Court of Appeals and remanded the case for reinstatement of the original judgment dated August 3, 1982. The Supreme Court of Arizona denied petitioner's timely Motion for Reconsideration on April 7, 1987. The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3). This petition is being filed within ninety days from the April 7, 1987 order denying petitioner's Motion for Reconsideration.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

3. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an insurance "bad faith" case arising from the insureds' dissatisfaction with an automobile purchased to replace their insured car, which had been demolished in an accident. Although petitioner replaced the insureds' car within two weeks of the accident with a car having a value within $200 of the insured car, the jury awarded the insureds $15,000 in compensatory damages and $3,500,000 in punitive damages. The trial court set the punitive damage award aside on a number of grounds, including its excessiveness, and ordered a new trial. The intermediate appellate court affirmed the grant of a new trial, holding that there was no basis in the record to warrant a punitive damage award of $3,500,000.

The Supreme Court of Arizona, applying unfavorable Arizona law established after the verdict while refusing to apply post-verdict Arizona law favorable

to petitioner,[1] ordered the jury's verdict reinstated. While each discrete act of judicial legerdemain performed by the court below to reach its result may not be cognizable under the federal constitution, the ultimate result and the process by which it was reached, taken as whole, raise substantial and important federal questions which go to the heart of the manner in which juries, uncontrolled by any meaningful legal standards, administer an *ad hoc*, government-sponsored system of punishment on a daily basis in Arizona and other States.

A. Facts Relevant to Petitioner's Constitutional Questions

On December 6, 1979, respondent Cynthia Hawkins was involved in an accident in which respondents' five-month old car was "virtually demolished." The accident was reported to their insurer, petitioner, that same day. Within a few days, the damaged car had been determined by petitioner to be a "total loss." App. 1a-3a, 733 P.2d, at 1076.

During the first week after the accident, petitioner's total loss adjuster determined the Blue Book value of respondents' car to be $6,545 and the market value (actual cash value) to be $6,165. This latter calculation took into account a $35 subtraction from the estimated cash value as a reconditioning or "clean-up" deduction. On December 13, respondents requested that petitioner furnish them with a comparable car

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[1] The Supreme Court of Arizona issued *Rawlings* v. *Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986), on July 22, 1986; it issued *Linthicum* v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986), on July 23, 1986. As discussed *infra*, the court below applied *Rawlings* but refused to apply *Linthicum* to the case at bar.

rather than the actual cash value of their insured car. Respondents looked at four similar cars and requested that petitioner purchase one of them, the cost of which was $300 more than petitioner was prepared to pay.

On December 20, respondents accepted a check from petitioner for $6,471, payable to respondents and a local dealership, which they used to acquire a car. Respondents subsequently determined that the car they purchased was not sufficiently comparable to their insured car because it lacked power windows, had a larger engine, had dealer-installed rather than factory-installed cruise control, and lacked several styling features of their insured car. No evidence of the replacement car's actual cash value was presented at trial. The only evidence on this subject was petitioner's acknowledgment on appeal that the list price of the replacement car was at least $161.45 less than the list price of respondents' insured car.

Over petitioner's objections, the trial court permitted testimony of three former employees of petitioner on the subject of petitioner's claims practices. One witness testified concerning policies of petitioner's Tacoma, Washington, office. Another testified concerning activities in petitioner's Phoenix office during a period fifteen years prior to respondents' claim. Although not involved in the adjustment of respondents' loss, a third testified concerning practices in the Phoenix office at the time of respondents' claim. That latter testimony covered the deduction, in valuing a "total loss," of a $35 "clean-up" charge and a $5 "tire wear" charge in determining the actual cash value of a car. The ex-employee who had worked for petitioner for two years in the early 1960s, Mr. William Boettcher, testified, *inter alia*, that petitioner's

policy was to settle claims "for as low an amount as possible" so as to "save the company money . . . ." App. 8a, 733 P.2d, at 1078. No evidence was admitted regarding the number of times the "clean-up" fee had been deducted with respect to other claims. During the trial, however, the following colloquy took place between respondents' counsel and one of the witnesses:

> Q. If Allstate has 100,000 total loss claims every year, and they take $35 off on each one of those, that amounts to $3,500,000, doesn't it?
>
> A. If you say so. I can't figure that far.

App. 18a, 733 P.2d, at 1083 n.9.

After the jury returned its verdict, petitioner moved for judgment notwithstanding the verdict and, in the alternative, for a new trial on a variety of grounds, including the excessiveness of the punitive damage award[2] and the trial court's errors in admitting the testimony of petitioner's three former employees. In a memorandum order granting these alternative motions, App. 48a-50a, the trial court expressly held, *inter alia*, that the verdict against petitioner for committing the tort of bad faith was not justified by the evidence; that punitive damages were not warranted; that "the damages are excessive"; that the verdict was the result of passion and prejudice on the part of the jury; and that the court had committed error

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[2] In its memorandum filed in support of its alternative motion, petitioner argued that the punitive damage award was more than 230 times the size of the award for compensatory damages and that the excessiveness of the award as a matter of law was virtually self-evident.

in admitting the testimony of the three former employees. App. 49a-50a.

On respondents' appeal to the Court of Appeals, that court concluded that the testimony of two of the three former employees was admissible but that the testimony of Mr. Boettcher was inadmissible under Rule 404(a), Arizona Rules of Evidence, because it constituted character evidence which was not sufficiently similar to or contemporaneous with the actual experience of respondents to qualify for admission under Rule 404(b) as evidence of a pattern of bad faith conduct by petitioner. App. 39a.

The Court of Appeals rejected respondents' argument that the $3,500,000 punitive damage award could be sustained on the theory that it bore a "reasonable relationship to the nature of the misconduct, Allstate's profit from such misconduct, its history, wealth, and income, and the deterrent effect [of that award]." App. 44a. The Court of Appeals determined that petitioner's conduct could be found to be "oppressive" as a matter of Arizona law, and therefore sufficient to sustain a punitive damage award, only if petitioner was shown at trial to have engaged in a "corporate policy, sufficient to constitute a pattern, whereby an insurer chisels an amount small enough from each claimant such that only the occasional person will object and litigate the matter." App. 45a. The Court of Appeals held that "where punitive damages are based on wrongful corporate policies which are profit oriented, the supporting evidence [regarding the amount of punitive damages] must go far beyond informed speculation." App. 46a.

Finding that the only portion of the record regarding the "profits" petitioner might have realized

from its $35 "clean-up" deduction practice was the speculation of respondents' counsel in the question quoted above, at p. 6, a majority of the Court of Appeals held that "the amount of punitive damages is not justified by the evidence," *id.*, and affirmed the trial court's grant of a new trial. Because it found a basis for sustaining the grant of a new trial on this ground, the Court of Appeals did not reach the questions whether the punitive damage award was otherwise excessive or whether the verdict was the result of passion and prejudice. One member of the Court of Appeals would have affirmed the grant of judgment notwithstanding the verdict. App. 47a.

On December 17, 1985 respondents filed in the court below a Petition for Review of the Court of Appeals' decision. In the questions presented by respondents for review, which are reprinted in full *infra*, App. 66a-67a, respondents did not present to the Supreme Court of Arizona the questions whether the punitive damage award was "excessive" or whether the verdict was the result of "passion and prejudice"—grounds for the grant of the motion for new trial which had not been passed on by the Court of Appeals. In that petition, respondents did assert that Mr. Boettcher's testimony was admissible to show the "duration" of petitioner's alleged pattern of misconduct and that review should be granted on that question because "[n]o Arizona decision specifically indicates whether or not duration of misconduct is a factor . . . in assessing punitive damages." App. 67a. Respondents also argued that they were not required to introduce evidence regarding the amount of petitioner's ill-gotten "profits" in order to sustain a punitive damage award. Respondents acknowledged

that there was "no controlling Arizona decision" on this point, App. 67a, and sought review so that the court below could "clarify that rule . . . ." App. 72a.

The court below scheduled oral argument on respondents' Petition for Review to determine whether the case presented issues not presented by two other cases then pending on its docket, *Linthicum* v. *Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986), and *Rawlings* v. *Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986). Oral argument was presented to the court below in both *Linthicum* and the case at bar on May 1, 1986. On July 23, 1986, the court below handed down its decision in *Linthicum*, holding that punitive damages may not be awarded in Arizona unless proof of liability is established by "clear and convincing" evidence.

B. The Presentation of the Federal Questions

On May 16, 1986, petitioner filed in the court below a motion for leave to file a "supplemental" brief in order to brief a number of issues of state law and "the federal constitutional implications of the manner in which this punitive damage award was imposed . . . ." App. 22a, 733 P.2d, at 1085-86. That motion was necessary because more than three years had elapsed since the parties had filed briefs in the case and, under Arizona practice, the court below disposes of cases in which it grants review on the basis of the briefs filed in the intermediate appellate court unless one or both of the parties request permission to file "supplemental" briefs or the court directs the parties to do so *sua sponte*. Petitioner's motion was granted and its Supplemental Brief was filed on June 11, 1986.

In its Supplemental Brief, petitioner drew the attention of the court below to this Court's then-recent

decision in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986). Petitioner argued that punitive damages constitute a criminal penalty and expressly invoked what it characterized as the "due process" argument in *Lavoie*—that the excessive size of the award in this case was attributable to the lack of sufficient standards for assessing the size of punitive damage awards in Arizona. Petitioner also argued that it was entitled, under the Due Process Clause of the Fourteenth Amendment, to the federal constitutional protections accorded to defendants in criminal cases because punitive damages in Arizona are imposed to punish and deter and therefore constitute a criminal penalty. Finally, petitioner argued that the Due Process Clause prohibits the imposition of punitive damages absent "clear and convincing" evidence of the underlying liability.

On February 27, 1987, the court below handed down its decision, vacating the decision of the Court of Appeals and remanding the case for reinstatement of the jury's verdict. In addressing the admissibility of Mr. Boettcher's testimony, the court applied its newly formulated substantive test for punitive damages adopted on July 22, 1986 in *Rawlings* v. *Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986), to justify an expansion of Rule 404(b), Ariz. R. Ev. The court then determined that the testimony was also admissible on the issue of the "sum of punitive damages" to be imposed by the jury because it constituted "direct evidence of the duration of Allstate's misconduct . . . ." App. 15a, 733 P.2d, at 1082.

With respect to the punitive damage award, the court below held that Arizona law does not require any evidence of the profits realized by a defendant from its misconduct to sustain a punitive damage award. Following this rationale, the court reversed the contrary decision of the Court of Appeals on this point. App. 18a, 733 P.2d, at 1083.

The court below then proceeded to reach several additional questions which had not been addressed by the Court of Appeals and had not been presented in respondents' Petition for Review. First, the court held that "the amount of punitive damages awarded . . . is neither so excessive nor unreasonable . . . as to show passion or prejudice" on the part of the jury. App. 20a, 733 P.2d, at 1084. Regarding the amount of the award, the court next observed that, in Arizona, a punitive damage award is acceptable if it does not "'shock the conscience of the court'" and does "not financially kill the defendant." *Id.* The court then went on to observe that it had previously "upheld punitive damage awards representing a greater percentage of the defendant's wealth against claims of excessiveness." App. 20a, 733 P.2d, at 1084-85. By virtue of these holdings on issues not decided by the Court of Appeals and not included as questions in respondents' Petition for Review, the court below positioned itself to reinstate the jury's verdict by eliminating the remaining grounds supporting the trial court's grant of a new trial.

The court below then turned to petitioner's federal constitutional challenges to the punitive damage award. The court acknowledged that its practice in the past had been to consider "issues of 'general statewide' significance" on appeal "as an exception

to the general rule that an appellate court will not consider issues not raised in the trial court." App. 23a, 733 P.2d, at 1086. Without contesting the dissenting Justice's assertion that the federal questions raised by petitioner were ones of great statewide and national significance, App. 33a, 733 P.2d, at 1090, the court below held, *sua sponte and as a matter of first impression*, that whether it would reach a constitutional question raised for the first time in that court was in its absolute discretion:

> Thus, while we agree that this court has the power to consider the constitutional issues raised by Allstate, we decline to exercise that power in this case.

App. 24a, 733 P.2d, at 1086.

Justice Holohan, in dissent, pointed out that the $3,500,000 punitive damage award is three and one-half times the maximum fine imposable in Arizona for the commission of the most serious felony recognized by the legislature. App. 31a, 733 P.2d, at 1089. Justice Holohan also recognized that there "appear to be strong arguments . . . that due process requires . . . maximum limits [on punitive damage awards] because of [their] penal nature . . . ." App. 33a, 733 P.2d, at 1090.

Finally, the court considered another dispositive issue which had not been briefed or argued by the parties. That issue arose as a result of the court's holding in *Linthicum* v. *Nationwide Life Insurance Co.*, *supra*, in July of 1986, that the same "clear and convincing" evidence standard of proof which had been urged upon it by petitioner in this case under the federal and Arizona constitutions would be ap-

plied to punitive damage cases as a matter of state "policy." The issue was whether the standard adopted in *Linthicum* would be applied to the case at bar.

The court acknowledged that "[i]n Arizona, a civil opinion is presumed to operate retroactively," App. 25a, 733 P.2d, at 1087, and that retroactive application of the *Linthicum* standard of proof to this case would not result in unfairness to respondents, who had no "right" to punitive damages and who "theoretically [had been] fully compensated for their actual injury . . . ." App. 27a, 733 P.2d, at 1088. Nonetheless, the court below held that *Linthicum*'s "clear and convincing" evidence standard would not be applied to this case. This result was said to arise from the court's purported concern about "the potential burden on the judicial system from further litigation where claims have been disposed of by prior litigation . . . ." App. 27a-28a, 733 P.2d, at 1088. Without any discussion of the number of cases which might be affected, the court below determined that *Linthicum* would not be applied if a verdict or judgment had been entered prior to September 15, 1986 and "there is no reason to require a new trial other than application of the new burden of proof." App. 28a, 733 P.2d, at 1088.

In refusing to apply *Linthicum* to this case, the court below ignored the fact that petitioner had come into that court entitled to a new trial and arguing that it was entitled to a "clear and convincing" standard of proof. On the other hand, the appellant in *Linthicum* had not even raised the "clear and convincing" evidence issue in its Petition for Review; rather, the parties had been directed by the court below, *sua sponte*, to brief and argue that question.

150 Ariz., at 327, 723 P.2d, at 676. Justice Holohan, in dissent, concluded that all of the factors previously identified by that court as relevant to the "retroactivity" issue favored retroactive application. App. 30a, 733 P.2d, at 1089.

After the decision of the court below, petitioner filed a timely "Motion for Reconsideration." In that motion, petitioner pointed out that, by refusing to reach petitioner's federal constitutional arguments, the court had failed to recognize that those arguments were advanced in support of the judgment of the trial court under which petitioner was entitled to a new trial. Because of this, if petitioner prevailed on any of its federal questions, it would not have expanded its rights under that judgment nor contracted those of respondents. App. 53a-55a. Thus, petitioner argued that the court below was *required* to consider its federal constitutional challenge to the excessiveness of the punitive damage award and the manner in which that award had been imposed because that court had adopted and followed the familiar rule that an appellee is free, without filing a cross-appeal, to raise arguments on appeal in support of the judgment below so long as those arguments neither expand its rights nor contract the appellant's rights under the judgment from which the appeal has been taken. *E.g.*, *Maricopa County* v. *Corporation Commission of Arizona*, 79 Ariz. 307, 310, 289 P.2d 183, 185 (1955). In addition, petitioner argued for the first time—and at its first opportunity to do so—that the refusal of the court below to apply the *Linthicum* "clear and convincing" evidence standard to its case violated the Due Process Clause of the Fourteenth Amendment.

App. 55a-58a. Petitioner's motion was denied without opinion. App. 51a.

REASONS FOR GRANTING THE WRIT

Each of the questions presented herein raises fundamental federal constitutional issues regarding the manner in which punitive damage awards are assessed in civil actions in Arizona and all other States which recognize punitive damages. Question 1 presented herein is presently *sub judice* in this Court in *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987), 107 S. Ct. 1367 (1987). This question is manifestly deserving of plenary consideration, having been described by this Court as raising an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna Life Insurance Co.* v. *Lavoie*, slip op., at 13, 106 S. Ct., at 1589.

The remaining questions presented by petitioner are not yet before the Court. Before discussing the importance of those questions, petitioner shall address the question whether this Court's jurisdiction under 28 U.S.C. § 1257(3) may properly be invoked notwithstanding that the court below expressly refused to reach any of the federal questions raised by petitioner in its "supplemental" brief filed in that court and that the court did not expressly decide any of the federal questions renewed, or raised initially, in petitioner's Motion for Reconsideration.

A. Jurisdiction

1. *The Asserted Basis for Refusal To Reach the Federal Questions Is an Inadequate State Ground and Does Not Defeat This Court's Jurisdiction*

In a series of cases going back almost five decades, the court below has made it clear to litigants in Ar-

izona that it has the *power* to decide issues raised for the first time on appeal and that it *will* do so if the issues are sufficiently important. *Town of South Tucson* v. *Board of Supervisors*, 52 Ariz. 575, 84 P.2d 581 (1938). In 1971, the court below reiterated that although as a general matter it will not decide issues raised for the first time in that court, it will hear such issues if they are of "general statewide significance." *Ruth* v. *Industrial Commission*, 107 Ariz. 572, 574, 490 P.2d 828, 830 (1971). In *Ruth*, the court entertained and decided a state constitutional challenge to an Arizona statute raised in neither the trial court nor the court of appeals.

In 1984, the court below characterized this practice as "a well recognized exception" to the general rule when it decided a dispositive issue of state constitutional law which had been raised for the first time in a motion for rehearing in the court of appeals. *Barrio* v. *San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984). In *Barrio*, the court allowed the parties to file supplemental briefs, noting that resolution of the constitutional issue did not turn on "disputed" facts. The court struck down the challenged Arizona statute in that case. *Id.*, at 107, 692 P.2d, at 286.

In this case, the court below did not dispute in any way—nor could it have done so—that petitioner's federal questions comprise issues of "general statewide significance" for purposes of applying the court's own "well recognized exception." Nor did the court below suggest that it needed any additional facts in order to decide petitioner's federal questions (which are, in any event, not dependent on facts). Instead, after granting petitioner's motion to brief the issues, the

court unexpectedly departed from its "well recognized" rule and asserted absolute discretion not to consider an issue of statewide significance raised for the first time on appeal:

> We hold that consideration of a constitutional issue raised for the first time on appeal is discretionary with this court. This is not a case involving denial of a fundamental constitutional right in a criminal trial nor contentions which affect the jurisdiction of the court, and we do not feel compelled to exercise our discretion.

App. 24a, 733 P.2d, at 1086.[3]

This Court's cases establish that a state rule regarding the proper presentation of federal questions may not be invoked successfully to deny this Court jurisdiction over a case unless that state rule is "strictly or regularly" followed. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1954). Until the decision of this case by the court below, the rule in Arizona was clear: the Supreme Court of Arizona had jurisdiction to entertain questions raised for the first time on appeal and would exercise that jurisdiction if the question presented for the first time on appeal was one of general statewide significance. The complete

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[3] By holding that this case did not involve a "fundamental constitutional right in a criminal trial," the court below implicitly rejected on the merits petitioner's federal constitutional argument that because of the penal nature of the punitive damage award, it was entitled to all of the federal constitutional protections accorded to criminal defendants. Thus, at a minimum, the court below erroneously applied its new rule to this case because freedom from excessive fines is clearly a right available under the Eighth Amendment to all defendants in criminal cases.

departure from that settled rule in this case cannot, under *Barr*, constitute a basis for divesting this Court of its jurisdiction over the substantial federal questions raised by petitioner.[4]

2. *Alternative Basis Requiring Decision of Petitioner's Federal Questions by the Supreme Court of Arizona*

Although *Barr* refutes any argument that this Court does not have jurisdiction over this case, petitioner would add that its presentation of the federal questions was also fully consistent with the rule of the court below that an appellee, without filing a cross-appeal or cross-petition, may raise on appeal any argument in support of the judgment below so long as that argument would not, if successful, expand its rights under the judgment or contract the rights of the appellant. *See, e.g., Maricopa County* v. *Corporation Commission of Arizona*, 79 Ariz. 307, 289 P.2d 183 (1955).[5]

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[4] The assertion of the court below that it has *absolute* discretion to hear or not to hear questions raised for the first time on appeal is itself insufficient to constitute an adequate state ground for defeating this Court's jurisdiction because it vests too much discretion in the court below to discriminate against the presentation of federal questions. *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969) (procedural rule requiring "reasonable notice" to opposing counsel "more properly deemed discretionary than jurisdictional" because "reasonable" is subject to a variety of interpretations; rule therefore cannot "bar review [in this Court] by certiorari").

[5] In *Maricopa County*, the Supreme Court of Arizona embraced the classic formulation of this principle articulated by Justice Brandeis in *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924). As stated by Justice Brandeis, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the

There is no doubt that the favorable resolution of petitioner's federal constitutional questions would not have enhanced its right to a new trial or diminished respondents' rights under the trial court's judgment as affirmed by the Court of Appeals. It is clear in Arizona that if a jury verdict is "excessive," a new trial on punitive damages is appropriate. Excessiveness was a ground for the trial court's grant of petitioner's motion for a new trial. App. 49a. Therefore, petitioner was entitled in the Court of Appeals and the Supreme Court of Arizona to argue excessiveness under any theory as long as its argument, if successful, would not expand its right to a new trial. As noted above, petitioner argued successfully to the trial court that the punitive damage award was excessive because it was grossly disproportionate to the compensatory damage award. In the court below, petitioner did nothing more than raise federal grounds by which the trial court could have reached precisely the same result using essentially the same analysis.[6]

The compelling need to apply this principle to this case is obvious because, as discussed above, the court below stripped petitioner of its state-law right to a

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reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id.*, at 435 (footnote omitted).

[6] Because Arizona courts apply the salutary rule that constitutional questions should be decided only if there is a necessity for doing so, *e.g.*, *State* v. *Yslas*, 139 Ariz. 60, 63, 676 P.2d 1118, 1121 (1984), there is no reason to believe that either the trial court or the Court of Appeals would have resolved petitioner's federal questions had they been presented to those courts. The necessity for deciding petitioner's federal questions did not even arise until the court below determined that petitioner was not entitled as a matter of state law to a new trial of this case.

new trial granted by the trial court and affirmed by the Court of Appeals by reaching and deciding adversely to petitioner questions regarding the excessiveness of the punitive damage award which were not even presented by respondents to the court below in their Petition for Review. This Court should not permit state courts to manipulate its jurisdiction through the revision, misapplication and failure to apply state rules regarding proper presentation of federal (and state-law) questions as occurred in this case.[7]

B. The Questions Presented Are Important, Recurring Questions of Federal Constitutional Law That Should Be Settled by This Court

1. *The Excessiveness of the $3,500,000 Punitive Damage Award*

As stated by the court below, the purposes of the punitive damage award in this case, as in any case,

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[7] Because, as discussed in the text above, petitioner could not have anticipated that the court below would reinstate the jury's verdict based on its resolution of questions in respondents' favor which had been decided adversely to respondents by the trial court, not ruled on by the Court of Appeals and not presented as questions for review in respondents' Petition for Review in the court below, petitioner would in any event be entitled, under this Court's decision in *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930), to raise all of its federal questions for the first time in this Court.

In addition, it is clear that Question 4 did not arise until the court below had determined, *sua sponte*, that it would not apply its decision in *Linthicum* to this case without giving petitioner the opportunity to brief or argue that question.

are "not to compensate the plaintiff, but to express society's disapproval of outrageous conduct," App. 11a, 733 P.2d, at 1080, and to "punish the defendant and serve as an example to deter future similar misconduct." App. 19a, 733 P.2d, at 1084. In Arizona, the maximum monetary punishment that could have been inflicted on petitioner if it had been convicted, after a criminal trial accompanied by all of the rights and procedural safeguards accorded to criminal defendants, of a deceptive business practice would have been $20,000.[8] Thus, petitioner suffered the imposition of a fine 175 times as great as it could have received at the conclusion of a criminal trial for what would appear to be roughly analogous conduct.

In addition, as petitioner argued to the trial court in successfully urging that the punitive damage award was excessive, the award is 233 times as great as the award for compensatory damages. This punitive fine was imposed in a civil action in which no limit had been placed on the verdict the jury could return. Indeed, in Arizona the "gentle rule that [punitive damages] not be excessive," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), means that an appel-

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[8] Arizona punishes the commission of deceptive business practices as "class 1" misdemeanors, *Ariz. Rev. Stat. Ann.* § 13-2202 (1978), which carry a fine of up to $20,000. § 13-803 (Cum. Supp. 1986). Under Arizona law, all or a portion of that criminal fine may be paid over to any person who suffered damage because of the crime. In determining the amount of restitution, the court cannot take into consideration the "economic circumstances of the defendant." *Ariz. Rev. Stat. Ann.* § 13-804C (Cum. Supp. 1986). As pointed out by Justice Holohan in dissent below, the highest monetary fine imposed by the legislature of Arizona for any criminal offense is $1,000,000. App. 31a, 733 P.2d, at 1089.

late court may intervene to reduce an award only if the award will "kill" the defendant. App. 20a, 733 P.2d, at 1084.

As appellant Bankers Life and Casualty Company has demonstrated in its opening brief in this Court, the concept of proportionality carried from Chapter 20 of Magna Carta into the Eighth Amendment provides far more protection from the infliction of excessive monetary punishment than simply preservation of the financial life of the defendant. *Bankers Life and Casualty Co.* v. *Crenshaw*, Br. of Appellant, at 25-27, 36-39. By any standard this Court might adopt in that case or the case at bar, the punishment inflicted on petitioner is constitutionally excessive.

Furthermore, the jury's award in this case was reinstated only after an extraordinary exercise by the court below of judicial gymnastics in which the rules of the game were changed or ignored wherever necessary in order to reinstate the excessive award. The court held, for the first time, that the "duration" of the alleged conduct warranting the imposition of punitive damages is an appropriate consideration in determining the amount of punitive damages which should be assessed. App. 15a, 733 P.2d, at 1085. This holding of *substance* was then relied upon by the court below both to justify its refusal to set aside the award as excessive and to justify the admission of the testimony of a former employee who had not worked for petitioner for fifteen years, the wrongful admission of which had been one of the bases for the trial court's grant of petitioner's motion for a new trial and the affirmance of that grant by the Court of Appeals. Finally, in order to reinstate the jury verdict, the court below had to decide in respondents'

favor two crucial questions that had not been presented to the court by respondents, while simultaneously disallowing petitioner's attempt to invoke the protections of the federal constitution for the limited purpose of preserving its right to a new trial.

Whatever may be said of the due process implications of these and other similar actions set forth above in the context of the imposition of compensatory damages, the imposition of a $3,500,000 punitive fine in this fashion surely is violative of the Due Process Clause. The standards and rules under which this award was reinstated produced the opposite of the certainty which this Court has required when criminal penalties are to be imposed. *See generally Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983). Petitioner had no fair warning that its conduct in 1979 could lead, in 1987, to reinstatement of a jury verdict that was sustained under legal standards that were nonexistent in 1979. This violation of due process was compounded by the jury's exercise of its uncontrolled discretion to assess punitive damages in a virtually unlimited amount, acting with *carte blanche* to impose a punitive fine based upon "their own notions of what the law should be . . . ." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966). This Court should grant certiorari in order to make clear to all state courts that the Due Process Clause of the Fourteenth Amendment precludes the administration of a system of punitive justice in this fashion.

2. *The Question Whether Punitive Damages May Be Imposed Without According Federal Constitutional Protections Due to Defendants in Criminal Cases Should Be Decided by This Court*

Punitive damages in Arizona, as in other jurisdictions, comprise a governmentally sponsored system for imposing penal fines for the purposes of enforcing society's standards through punishment and deterrence. In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963), this Court struck down a federal statute under which persons were punished with loss of citizenship in proceedings that did not afford them the procedural safeguards guaranteed by the Fifth and Sixth Amendments. Since that case was decided, this Court has made clear that the imposition of a monetary penalty, without more, may also require the State to provide the same procedural protections as are available to defendants in criminal cases. *United States* v. *Ward*, 448 U.S. 242, 248-51 (1980).

There can be no dispute that punitive damages are imposed in Arizona solely for the purposes of punishment and deterrence. As observed by Justice Holohan below in this case, jurors in Arizona "are told that the purpose of punitive damages is to punish the defendant and to deter others. This also is the purpose of the criminal law." App. 31a, 733 P.2d, at 1089 (Holohan, J., dissenting). This Court has also commented on the close relationship between punitive damages and fines imposed in criminal cases, stating that

> [p]unitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."

Electrical Workers v. *Foust*, 442 U.S. 42, 48 (1979), *quoting Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 350. Indeed, as Justice Marshall has observed, punitive damages "serve the same function as criminal penalties and are in effect private fines." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (dissenting opinion).

Question 2—whether "a punitive 'fine' should be imposed after a *civil* trial," *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (emphasis added)—is manifestly of great importance and worthy of plenary consideration by this Court in the case at bar. By permitting the award of punitive damages to private plaintiffs, the States have, for all practical purposes, conferred on those plaintiffs the power to prosecute defendants for "reprehensible" conduct and to impose monetary punishments on defendants which are constitutionally indistinguishable from the punitive fines imposed after conviction in a criminal trial. This civil imposition of criminal punishment cannot be reconciled with this Court's cases, which require that before the States may impose sanctions in order to punish and deter antisocial conduct, the guarantees of the Fifth and Sixth Amendments must be accorded to the defendant.

3. ***The Question Whether Punitive Damages May, Under the Due Process Clause of the Fourteenth Amendment, Be Imposed Only After Liability Is Demonstrated by "Clear and Convincing" Evidence Should Be Resolved by This Court***

Like the court below in *Linthicum* v. *Nationwide*

Life Insurance Co., supra, a number of state courts[9] and state legislatures[10] have recognized the penal function served by punitive damages and the arbitrary fashion in which punitive damages are imposed—being "frequently based upon the caprice and prejudice of jurors," *Smith* v. *Wade,* 461 U.S., at 59 (Rehnquist, J., dissenting). Accordingly, these courts and legislatures have determined that punitive damages should not be imposed absent clear and convincing evidence of liability for such damages.

This Court has similarly recognized that the Due Process Clause requires a higher standard of proof when persons are at risk of being deprived of certain types of rights. *See Santosky* v. *Kramer,* 455 U.S. 745 (1982) (clear and convincing evidence required in order to support extinguishment of parent-child relationship); *Addington* v. *Texas,* 441 U.S. 418 (1979) (clear and convincing evidence required to support involuntary commitment). This Court has also rec-

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[9] *E.g., Tuttle* v. *Raymond,* 494 A.2d 1353, 1363 (Me. 1985); *Travelers Indemnity Co.* v. *Armstrong,* 442 N.E.2d 2d 349, 362-63 (Ind. 1982); *Wangen* v. *Ford Motor Co.,* 97 Wis. 2d 260, 294 N.W. 2d 437 (1980).

[10] E.g., Act of the State of Alabama, H.27, 1 (June 9, 1987); *Alas. Stat.* § 09.17.020 (Supp. 1986); *Minn. Stat. Ann.* § 549.20 (Supp. 1987); *Mont. Code Ann.* § 27-1-221(2) (1986); *Ore. Rev. Stat. Ann.* § 30.925 (1983); *Fla. Stat. Ann.* § 768.73 (Supp. 1987) (clear and convincing evidence required to sustain punitive damage awards greater than three times the amount of actual damages); *Okla. Stat. Ann.,* Title 23, § 9 (1987) (clear and convincing evidence required to sustain punitive damage awards in excess of actual damages). The Colorado legislature has gone even further, requiring proof beyond a reasonable doubt to sustain a punitive damage award. *Colo. Rev. Stat. Ann.* § 13-25-127(2) (Supp. 1986).

ognized that where criminal penalties are to be imposed, "the standard of certainty is higher." *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983).

This Court should decide in this case whether the Due Process Clause of the Fourteenth Amendment requires clear and convincing evidence of a plaintiff's right to recover punitive damages. Whether or not, as petitioner argues above, the size of punitive damage awards should be made subject to the restraints of the Eighth Amendment because of their punitive purposes, the arbitrariness with which such punishment may be and is routinely imposed implicates substantial due process considerations. Where the chance of error is great, this Court has not hesitated to impose the Due Process Clause as a shield against arbitrary governmental action. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319 (1976). It should do so once again in this case.

4. *This Court Should Decide Whether the Punitive Purposes Advanced by Punitive Damage Awards Require That Rules Restricting Their Imposition Be Applied to Cases Pending on Appeal*

In *Griffith* v. *Kentucky*, 107 S. Ct. 708 (1987), this Court held that its decisions announcing new federal constitutional rules for the conduct of criminal prosecutions must, under the Due Process Clause of the Fourteenth Amendment, be applied retrospectively to cases pending on direct review or otherwise not yet final. As the Court observed in *Griffith*, failure to do so "violates the principle of treating similarly situated defendants the same." *Id.*, at 713.

If this Court holds, in *Bankers Life and Casualty Co.* v. *Crenshaw*, that the Eighth Amendment applies to control the size of punitive damage awards in civil

cases, the question will necessarily arise whether its decision will be applied retrospectively to other cases, like the case at bar, as a matter of constitutional compulsion or practice.[11] Whether the constitutional dimension of this question is to be governed by the rule laid down in *Griffith*, or by the rule established for civil cases as articulated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), is an important issue which should be decided in this case.

The court below held that it was under no constitutional compulsion to apply its decision in *Linthicum*—adopting the "clear and convincing" standard of proof—"retrospectively" to this case. As pointed out above, this issue had been raised in *Linthicum* by the court below *sua sponte*. It would be difficult to posit two cases in which two similarly situated defendants had been subjected to more disparate treatment than *Linthicum* and the case at bar. This Court should decide whether the court below was entitled to treat petitioner as a "civil" defendant for purposes of its retrospectivity analysis or whether, instead, petitioner was entitled, as a matter of federal constitutional right, to "retrospective"[12] application of

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[11] This Court's decision in *Henry* v. *Collins*, 380 U.S. 356 (1965) (per curiam), which applied retrospectively the constitutional rules announced in its decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), establishes that petitioner is in any event entitled to the benefits of any ruling favorable to Bankers Life and Casualty Co. in No. 85-1765 as a matter of this Court's settled practice.

[12] As is evident from the circumstances discussed above, the evidentiary rule announced in *Linthicum* was not "applied" to the case at bar solely because the court below chose to use *Linthicum* as the vehicle for announcing this new evidentiary

Linthicum because the rule announced in *Linthicum*, although grounded on state "policy," nevertheless affected directly the circumstances under which essentially criminal punishment was and is to be administered in Arizona. In an area of the law in which the rules are being modified constantly as regards the imposition of punishment, it is particularly important for this Court to clarify the circumstances under which similarly situated defendants may be subjected to different punishments on the basis of the "selective application of new rules . . . ." *Griffith* v. *Kentucky*, 107 S. Ct., at 713.

CONCLUSION

The questions presented by petitioner are substantial and arise on a daily basis in litigation occurring throughout the United States. As the dissenting Justice below noted, these questions "will not disappear." App. 33a, 733 P.2d, at 1090. The petition should be granted and these questions set for plenary consideration.

July 6, 1987

Respectfully submitted,

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standard rather than this case, which was argued to the court below on the same day as *Linthicum*.

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APPENDIX

IN THE SUPREME COURT OF THE STATE
OF ARIZONA

Supreme Court
No. CV-86-0010-PR

Court of Appeals
No.1 CA-CIV 6881

Maricopa County
No. C-432754

JACK RANDY HAWKINS and CYNTHIA HAWKINS, husband and wife,

Plaintiffs-Appellants,

vs.

ALLSTATE INSURANCE INSURANCE COMPANY, a foreign corporation, and DOES I through V,

Defendant-Appellee.

Appeal from the Superior Court of Maricopa County

The Honorable David J. Perry, Judge

REVERSED AND REMANDED

FILED
FEB 26 1987

Memorandum Decision of the Court of Appeals
Filed August 13, 1985
Vacated

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GORDON, Chief Justice

Jack and Cynthia Hawkins (Hawkins) petitioned this court to review a decision of the court of appeals reversing the trial court's grant of a motion for judgment notwithstanding the verdict in favor of Allstate Insurance Company (Allstate) and affirming the trial court's grant of Allstate's motion for a new trial. Hawkins v. Allstate Insurance Company, No. 1 CA-CIV 6881 (Ariz.Ct.App. filed Aug. 13, 1985). We granted review to determine the admissibility of an insurer's past claims practices and policies and to examine the quantum of proof necessary to sustain an award of punitive damages. Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. In its supplemental brief, Allstate questioned the constitutionality of the manner by which punitive damages are imposed. We have jurisdiction pursuant to Ariz. Const. art. 6, §5(3) and A.R.S. §12-120.24.

I. FACTS

In July 1979, the Hawkins purchased a new Chevrolet Monte Carlo, loaded with options, for approximately $8,000. Five months after purchasing the Monte Carlo, Cynthia was involved in an automobile accident that virtually demolished the car.

The Hawkins were insured by Allstate under a standard automobile liability policy. That policy included a collision provision limiting Allstate's liability to either paying the

actual cash value of the car at the time of the loss or to replacing the car with one of like kind and quality.

The Hawkins reported the accident to Allstate the day it happened, December 6, 1979. Within a few days, Allstate classified the car as a "total loss" after determing that the actual cash value of the car was less than the estimated repair cost. The Hawkins' claim was transferred to a total loss adjuster, Paul Schwenk.

According to Allstate's witnesses, the actual cash value of a car is its market value. To determine actual cash value, Allstate's total loss adjusters first establish a guide book value by calculating the high retail Blue Book value of the car and its optional equipment minus deductions for the car's condition immediately prior to the loss. Such deductions represent amounts needed to bring the car to average retail condition and include deductions for the condition of the exterior of the car, paint, bumpers, upholstery, glass, tires, and clean up. The adjusters then perform a "market verification" by asking three or four local dealerships to estimate the insured car's worth and sometimes by checking the selling price of similar cars advertised in local car magazines. From the range of values resulting from this procedure, Allstate's adjusters determine a specific dollar amount as the actual cash value, apparently relying most heavily on the low estimates received from local dealerships.

In the Hawkins' case, Schwenk determined that the Blue Book value of the Hawkins' car was $6,545. Schwenk did not examine the car and failed to consider many of the accessories on the insured car. From this figure, Schwenk deducted a $35 clean-up fee, which resulted in a guide book value of $6,510. Four dealer estimates of the value of a similar car ranged from $6,150 to $6,300. These estimates were based on Schwenk's description of the car and did not reflect all the options on the insured car. The

actual cash value recorded in the Hawkins' claim file was $6,165 and was accompanied by the following explanation:

> Dealers have replacements, similar equipment but more miles; say one like this worth $6,200. Deduction for reconditioning. ACV $6,165.

Schwenk first contacted Hawkins on December 13, 1979, one week after the accident. At that time, the Hawkins requested that Allstate provide them with a replacement car, rather than a sum of money equal to the actual cash value of their "totalled" car. Schwenk sent them to look at four similar Monte Carlos at a local dealership. Schwenk would not let the Hawkins have the car they selected because it was $300 more than Allstate was willing to pay.[1] Instead, Schwenk selected one of the other cars and insisted that the Hawkins take it. The Hawkins refused because the car Schwenk selected had few of the options their insured car had and was not comparable in either quality or gas mileage.

Four days after Schwenk rejected the car the Hawkins selected as a replacement, Schwenk told the Hawkins he would pay them $4,500 in cash unless they took the car he had selected. The Hawkins refused, explaining that they had paid over $8,000 for their car five months earlier and could not purchase a comparable car for $4,500. Later, during the same conversation, Schwenk threatened to deliver a check for $5,000.

By December 20, the Hawkins, desperate for a car, accepted a check for $6,471, payable to Hawkins and a local dealership, to purchase the car Schwenk had selected. It had been approximately a week since the Hawkins viewed the car, and when Jack Hawkins went to pick up the car, he again realized the cars were not comparable

[1] The evidence is conflicting whether the car the Hawkins selected was $300 more than the actual cash value of their insured car or $300 more than one of the remaining three cars.

and called Schwenk from the dealership to tell him he did not want the car. After a lengthy, heated discussion and assurances from Schwenk that the replacement car would be brought up to the insured car's standards after the holidays, Jack Hawkins reluctantly gave the check to the dealer.

The replacement car lacked power windows, had a larger engine and got worse gas mileage, had dealer-installed (not factory-installed) cruise control, and lacked several styling features of the original car. After the holidays, Allstate sent an additional $125 to the Hawkins to install power windows, but the Hawkins were unable to get the work done for less than $600. Allstate refused to make any other adjustments and closed the file. Although no evidence of the replacement vehicle's actual cash value was presented, Allstate conceded on appeal that the list price of the replacement vehicle was at least $161.45 less than that of the insured car.

The Hawkins sued Allstate for fraud and bad faith. At trial, three former Allstate employees testified about Allstate's claims procedures and practices. None had any direct experience with the Hawkins' claim. In addition, Schwenk and his supervisor testified.

The trial judge directed a verdict in favor of Allstate on the fraud count but submitted that bad faith claim to the jury to consider liability for both compensatory and punitive damages. The jury awarded the Hawkins $15,000 compensatory damages and $3.5 million punitive damages. The trial court subsequently granted Allstate's motion for judgment notwithstanding the verdict on the ground that the evidence presented at trial was insufficient to sustain the verdict. In the alternative, the trial court granted Allstate's motion for a new trial on five grounds. The court of appeals held that the trial court erred in entering a judgment notwithstanding the verdict, but affirmed the grant of a new trial for two reasons: 1) the testimony of

a former Allstate claims adjuster was improperly admitted, and 2) the amount of the punitive damages award was not justified by the evidence.[2] *Hawkins*, slip op. at 11, 16.

II. ADMISSIBILITY OF INSURER'S PAST CLAIMS PRACTICES

During trial, Hawkins called three former Allstate employees to testify about Allstate's procedures for handling total loss claims. Over Allstate's objection on the grounds of relevancy, each testified concerning Allstate's method of determining the amount of an insured's loss (the actual cash value of the property) and general company policies regarding claims handling.

One former claims representative, Pat Paterno, testified about Allstate's claims practices in the Phoenix office at the time the Hawkins claim was processed. Although she did not work on the Hawkins claim, Paterno testified that as a claims representative Allstate instructed her to automatically make certain deductions in determining a car's actual cash value. Specifically, she testified that adjusters were instructed to deduct an extra $5 for tire wear and *always* to deduct a $35 cleaning fee, regardless of the car's cleanliness. She testified that her supervisors explained that a $5 deduction "wouldn't mean much to an insured or claimant, but $5 on every claim would mean a lot to the company."

Another former claims representative, Jan Mauritz, was employed by Allstate in Tacoma, Washington from 1978 to 1981. Like Paterno, Mauritz testified that he was instructed automatically to make certain deductions, including a cleaning fee, in valuing a "total loss." He testified that he was instructed to offer an insured the lowest value of a claim because the insured probably would take it in order to get his car fixed quickly. He also testified that

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[2] The Hawkins abandoned their appeal from the directed verdict on the fraud count. *Hawkins*, slip op. at 4.

Allstate used the adjusters' "severity rating," a ratio of total dollars paid out in claims over the number of claims, to evaluate adjusters' performance and promotion potential. Mauritz opined that the claims-handling practices and policies to which he testified were followed throughout the company and not merely in the Tacoma office because they were promulgated through corporate literature and policy statements. In his opinion, these practices "may lead to what one may call chiseling, to calculated offers substantially below fair value. . . ."

The third former Allstate employee that testified, William Boettcher, was employed by Allstate as a claims examiner in Phoenix from 1962 to 1964, 15 years before the Hawkins' claim. He testified that he was instructed automatically to take certain deductions on property damage claims, including amounts for tire wear. He also testified as to Allstate's explanation for making the deductions:

> Q Was an explanation given as [to] why you should make various deductions?
>
> A Yes, it was.
>
> Q What explanation was given?
>
> A Basically, that particularly in terms of property damage or collision claim, that the owner of the vehicle was concerned whether or not he was going to get his vehicle back, how soon he could get it repaired and so forth. Therefore, he would not perhaps object to some of these small deductions. And you'd be able to settle the claim at a cheaper rate. The statement was frequently made that if you could save one dollar on a million claims, you would save the company as much as a million dollars.

Boettcher testified that he heard this explanation from instructors at an Allstate regional claims school, which he attended for approximately 2 weeks in 1962, from regional

claims supervisors, and from his local assistant manager in the Phoenix office.

Boettcher testified that both the local and regional claims supervisors' general policy was to settle claims for as low an amount as possible. He also testified about the function of the claims department during his employment: "In general terms, I'd say it was perhaps not to settle claims as much as it was to save the company money, because this would increase their profits."

Among other reasons, the trial court granted Allstate's motion for a new trial after deciding it had erred in admitting the testimony of the former Allstate employees. The trial court did not explain the perceived error, but only summarily concluded that the testimony of the three witnesses should not have been admitted.[3]

The court of appeals affirmed the grant of a new trial, but held that the testimony of only one of the former employees, William Boettcher, was erroneously admitted. The appellate court reasoned that Boettcher's testimony was inadmissible under Rule 404(b), Ariz. Rules of Evid., 17A A.R.S.[4] because Allstate did not deny its acts nor claim they were unintentional and because the evidence was irrelevant as the pratices Boettcher described were not sufficiently similar to the Hawkins' experience to be admissible to establish a pattern of bad faith to support a punitive damages award.

In light of this procedural history, the issue we address is whether the trial court's admission of Boettcher's tes-

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[3] We take this opportunity to voice our objection to such conclusory rulings because they impair effective appellate review. We urge trial judges to articulate their reasoning so appellate courts can determine on appeal whether the ruling was erroneous.

[4] The Rules of Evidence, 17A A.R.S., will be referred to as "Rule ____" throughout this opinion.

timony was an error that justified granting Allstate's motion for new trial.

The power to grant a new trial is largely within the trial court's discretion, but this power is not unlimited. King v. Superior Court, 138 Ariz. 147, 151, 673 P.2d 787, 791 (1983). "[I]f it appears clearly from the record that there was no error in the matters presented in the motion for new trial, it is an abuse of discretion for the court to grant a new trial." Helena Chem. Co. v. Coury Bros. Ranches, 126 Ariz. 448, 450, 616 P.2d 908, 910 (App. 1980).

A party cannot urge in a motion for new trial that evidence was erroneously admitted unless a proper objection, stating the specific ground of the objection, was made at the time the evidence was offered, unless the error is fundamental. M. Udall & J. Livermore, *Arizona Law of Evidence*, §12, at 14 (2d ed. 1982); *see* Helena Chem. Co., 126 Ariz. at 453, 616 P.2d at 913; Rule 103. At trial, Allstate objected to Boettcher's testimony only on grounds of relevancy.[5] We disagree with the court of appeals that Boettcher's testimony was erroneously admitted because it was irrelevant.[6]

A. Relevance

1. Rules of Evidence

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evi-

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[5] In pre-trial motions, Allstate also objected to Boettcher's qualifications as an expert, but his testimony was not offered as expert opinion evidence.

[6] Allstate's precise objection was that the testimony was "irrelevant and immaterial." Modern rules of evidence capture both concepts in the term "relevance." M. Udall & J. Livermore, *supra* § 81, at 160; Rule 401.

dence." Rule 401. Relevancy is not an inherent characteristic of proffered evidence; instead, it is the relationship between the proffered evidence and the fact sought to be proved. *See* M. Udall & J. Livermore, *supra*, at 163; 1 Weinstein's Evidence ¶401[03], at 401-17 (1986). Essentially, relevancy is a two-part test. First, evidence is relevant only if it relates to a consequential fact; evidence directed to an undisputed issue is irrelevant. What is at issue in a particular case is determined from the pleadings and the substantive law. M. Udall & J. Livermore, *supra*, at 161; Weinstein's Evidence, *supra*, at 401-17 to -19. Second, to be relevant, evidence need only alter the probability, not prove or disprove the existence, of a consequential fact. M. Udall & J. Livermore, *supra*, at 162; Weinstein's Evidence, *supra* ¶401[06], at 401-33 to -36. Allstate's liability for both the tort of bad faith and punitive damages was at issue during the trial. Therefore, evidence that tends to establish a prima facie case of bad faith or entitlement to punitive damages is relevant.

a. Bad Faith—Prima Facie Case

We recently clarified that tort recovery for bad faith is allowed if an insurer intentionally breaches the implied covenant of good faith and fair dealing in the insurance contract by denying the insured the security and protection from calamity that is the object of the insurance relationship. Rawlings v. Apodaca, ____ Ariz. ____, 726 P.2d 565 (1986). To establish a prima facie case of bad faith, Hawkins had to prove that Allstate acted intentionally, not inadvertently or mistakenly, and that Allstate dealt unfairly or dishonestly with the Hawkins' claim or failed to give fair and equal consideration to the Hawkins' interests. *Id.* at ____, 726 P.2d at 576.

b. Punitive Damages—Prima Facie Case

Punitive damages are recoverable in insurance bad faith tort actions only if the insured acted with an "evil mind" in breaching the implied covenant of good faith and fair

dealing. *Rawlings*, ____Ariz. at ____, 726 P.2d at 578-79. The requisite evil mind is found if the insurer intended to injure the insured or consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to the insured. *Id.* at ____, 726 P.2d at 578. In addition, the requisite evil mind may be inferred if the insured's conduct is sufficiently "oppressive, outrageous or intolerable." *Id.* at ____, 726 P.2d at 578-79.

To recover punitive damages, the plaintiff must also introduce sufficient evidence to allow the trier-of-fact to calculate a punitive damage award that is reasonable under the circumstances. *E.g.*, Nielson v. Flashberg, 101 Ariz. 335, 341, 419 P.2d 514, 520 (1966) Although a precise laundry list of relevant evidence is impossible, evidence is properly considered by the trier-of-fact in assessing punitive damages if it bears upon the purpose and function of punitive damages. The purpose of punitive damages is not to compensate the plaintiff, but to express society's disapproval of outrageous conduct and to deter such conduct by the defendant and others in the future. *See, e.g.*, Nielson v. Flashberg, 101 Ariz. at 341, 419 P.2d at 520; Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971).

One category of relevant evidence is the defendant's financial position. *See, e.g.*, Acheson v. Shafter, 107 Ariz. at 578, 490 P.2d at 834 (wealth or financial status of defendant relevant to allow jury to impose an appropriate punishment); Nielson v. Flashberg, 101 Ariz. at 341, 419 P.2d at 520. Obviously, the goals of punishment and deterrence would be circumvented if the financial position of the defendant allowed it to comfortably absorb the award.

Another category of relevant evidence is the nature of the defendant's conduct, including the reprehensibility of the conduct and the severity of the harm likely to result, as well as the harm that has occurred, from the defendant's conduct. *See* Mallor & Roberts, *Punitive Damages: Toward*

a Principled Approach, 31 Hastings L.J. 639, 667 (1980);[7] Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976). The more reprehensible the act and the more severe the resulting harm, the greater the award of punitive damages that is reasonable under the circumstances. The duration of the misconduct, the degree of defendant's awareness of the harm of the risk of harm, and any concealment of it are elements to consider in judging the reprehensibility of the defendant's conduct. *See* Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, ____, 582 P.2d 980, 990, 148 Cal.Rptr. 389, 399, (1978); Chodos v. Ins. Co. of North America, 126 Cal.App.3d 86, 104, 178 Cal.Rptr. 831, 841 (1981); State ex rel. Young v. Crookham, 290 Or. 61, ____, 618 P.2d 1268, 1274 (1980).

A third relevant consideration is the profitability of the defendant's conduct. *See* Cox v. Stolworthy, 94 Idaho 683, ____, 496 P.2d 682, 690 (1972); Wangen v. Ford Motor Co., 97 Wis.2d 260, ____, 294 N.W.2d 437, 460 (1980); Mallor & Roberts, *supra*, at 667-68. A punitive damage award that disgorges ill-gotten profits serves to deter future similar conduct by eliminating any profit incentive.

These factors are presented only as guidelines to the character of evidence that is *relevant* to assessing punitive damages and should be viewed as neither exhaustive nor exclusive.[8] Furthermore, it is well settled that not all relevant evidence is admissible and whether such evidence is admissible in a particular case depends upon the circumstances of that case. *See* Rules 402-411.

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[7] Although the authors advocate that the judge, not the jury, assess the sum of punitive damages, the evidence discussed here is appropriately considered by the trier-of-fact under Arizona's procedure for imposing punitive damages.

[8] Some courts and commentators suggest that the jury consider the plaintiff's litigation expenses in assessing punitive damages. We express no view on this factor in this case.

Thus, to establish a prima facie case for the recovery of punitive damages, Hawkins had to prove that an evil mind—either a desire to harm or conscious disregard of the Hawkins' right to a fair valuation of their property loss—motivated Allstate's bad faith conduct. To recover punitive damages Hawkins also had to establish a factual basis from which the jury could assess a sum of punitive damages that would accomplish the goals of punishment and deterrence.

2. Application to Present Case

Boettcher's testimony is relevant both to Allstate's liability for the tort of bad faith and punitive damages. *See* Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 343, 666 P.2d 83, 88 (App. 1983) (evidence of past deceptive sales practices relevant to whether those practices are currently used and to issue of punitive damages). Regarding Allstate's liability for bad faith, Boettcher's testimony is relevant to whether Allstate acted intentionally. Evidence of previous, similar acts alters the probability that the conduct in question was unintentional; the more frequently an act occurs, the more probable it is intentional. Thus, Boettcher's testimony made it more probable that the invalid $35 cleaning fee deduction used in estimating the actual cash value of Hawkins' loss was not mistakenly nor inadvertently made.

More importantly, Boettcher's testimony is relevant both to establish a prima facie case for recovery of punitive damages and to assess a sum of punitive damages. We note that unless the defendant is willing to take the stand and admit its "evil mind," the plaintiff must prove entitlement to punitive damages with circumstantial evidence. Thus, whether the defendant intended to injure the plaintiff or consciously disregarded the plaintiff's rights may be suggested by a pattern of similar unfair practices. Colonial Life & Acc. Ins. Co. v. Superior Court, 31 Cal.3d 785, 792, 647 P.2d 86, 90, 183 Cal.Rptr. 810, 814 (1982); Moore

v. American United Life Ins. Col., 150 Cal.App.3d 610, 624-25, 197 Cal.Rptr. 878, 886-87 (1984); *see* Rawlings v. Apodaca, ____Ariz. at ____, 726 P.2d at 578-79 (improper motives may be inferred from sufficiently oppressive, outrageous or intolerable conduct).

We disagree with the court of appeals that the practices about which Boettcher testified lacked sufficient similarity to the Hawkins' experience and the other adjusters' testimony to constitute such a pattern. All three former employees described a policy of routine, automatic deductions, regardless of their validity, in valuing an insured's loss. Boettcher's testimony is different because he did not describe the specific cleaning fee deduction testified to by Mauritz and Paterno and included in the actual cash value valuations of the Hawkins' car. This difference is immaterial to the purpose for which the evidence was offered. Boettcher's testimony was offered to show that Allstate engaged in a conscious course of conduct, firmly grounded in corporate policy, which denied Hawkins and countless other insureds the actual cash value of their property. The evidence was not offered to establish any particular conduct regarding the Hawkins' claim. This testimony was offered to explain Allstate's motive or its state of mind when dealing with the Hawkins and other insureds.

Boettcher's testimony also is different because he described Allstate's claims procedures and policies 15 years before the Hawkins claim. Allstate argues this time span robs the evidence of its relevance. We disagree. Remoteness in time goes to the weight of the evidence, not its admissibility. State v. Jeffers, 135 Ariz. 404, 418, 661 P.2d 1105, 1119, *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983). As noted above, relevance requires only a modicum of rationally probative forced. While a significant time span may reduce the probative force of evidence, it does not eliminate it.

Clearly, Boettcher's testimony concerning Allstate's past claims practices also was relevant to assessing an appropriate sum of punitive damages. Boettcher's testimony presents direct evidence of the duration of Allstate's misconduct and establishes evidentiary facts from which the jury could determine the reprehensibility of Allstate's conduct. *See ante* at 12–14.

Because we find Boettcher's testimony relevant to both the issue of bad faith and punitive damages, we hold that the trial court abused its discretion if it granted a new trial because Boettcher's testimony was not relevant.

B. Character Evidence

We also disagree with the court of appeals that a new trial was justified because Boettcher's testimony was erroneously admitted in violation of Rule 404. Because Allstate did not object to Boettcher's testimony as impermissible character evidence, this error was not preserved as an issue for Allstate's motion for a new trial. M. Udall & J. Livermore, *supra* § 12, at 18; Grant v. Arizona Public Service Co., 133 Ariz. 434, 450, 652 P.2d 507, 523 (1982) (objection that evidence is irrelevant, without specifying how or why, does not raise any issue on appeal where the evidence would have been relevant under any possible circumstance); 1 Weinstein's Evidence ¶ 103[02], at 103–23 to -24 (if a general objection is overruled, party objecting is precluded from asserting a proper objection on appeal). Therefore, we hold that the trial court abused its discretion if it granted a new trial because Boettcher's testimony was inadmissible character evidence.

However, even if the issue was properly preserved, the evidence was not admissible pursuant to Rule 404. Subsection (b) permits evidence of "other crimes, wrongs or acts" if the purpose is to show a party's motive, intent or absence of mistake or accident. These are precisely the purposes for which Boettcher's testimony was admitted. *See ante* at 15–17. We disagree with the court of appeals

that Rule 404(b) "is inapplicable." *See Rawlings* slip op. at 6. We interpret the court's statement to mean that because Allstate did not deny its acts nor allege that they were unintentional, the deliberateness of Allstate's conduct was not at issue and Boettcher's testimony was irrelevant because it was not directed to a fat of consequence to the determination of the case. This reasoning ignores that Boettcher's testimony is relevant and admissible to prove Allstate's improper motives for purposes of punitive damages. Furthermore, proof of intentional conduct is necessary to establish a prima facie case of the tort of bad faith. Absent a stipulation by Allstate to this element of the claim, Hawkins was required to put on such proof to survive a directed verdict. Also, when Allstate did present its defense, it took the position that its claims practices were innocent, cost-saving measures taken to prevent overpayment of claims. Certainly, Boettcher's testimony was admissible to rebut this contention.

C. Unfair Prejudice

Allstate also argues that in granting a new trial based on erroneously admitted evidence, the trial court properly exercised its discretion to exclude Boettcher's testimony because the probative force of the evidence was substantially outweighed by the danger of unfair prejudice. *See* Rule 403. Allstate urges that its objection on grounds of unfair prejudice. This argument finds support in our case law. *See* Jones v. Pak-Mor Mfg. Co., 145 Ariz. 121, 125, 700 P.2d 819, 823 (question of relevancy looks at whether evidence lacks probative value and whether probativeness is outweighed by danger of prejudice), *cert. denied*, ___ U.S. ____, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985). *But see* 1 Weinstein's Evidence ¶ 103[02], at 103-23 (objections pertaining to undue prejudice or impermissible character evidence must be stated specifically and are not raised by "incompetent irrelevant and immaterial" objection); Jay Edwards, Inc. v. New England Toyota Distributor, Inc., 708 F.2d 814, 823 (1st Cir. 1983) (only stated

objection was relevancy and court refused to consider prejudicial effect), *cert. denied*, 464 U.S. 894, 104 S.Ct. 241, 78 L.Ed.2d 231. However, Allstate misperceives the posture of this case on review. The issue is not whether the trial court could have exercised its discretion to exclude Boettcher's testimony as unfairly prejudicial, but whether admitting the testimony was an error that justified a new trial. Because we discern no legal error in the admission of Boettcher's testimony, we hold that the trial court abused its discretion by ordering a new trial on this basis.

III. PUNITIVE DAMAGE AWARD

The court of appeals reversed the entry of judgment notwithstanding the verdict, holding that Hawkins had established a prima facie case for punitive damages. However, the court affirmed the grant of a new trial because, inter alia, "the amount of punitive damages award was not justified by the evidence." Slip op. at 16. The court considered evidence of Allstate's corporate policy to deduct routinely a $35 cleaning fee from the estimated value of a total loss vehicle, as well as Allstate's dealings with the Hawkins, but concluded that the amount of the punitive damages award was improper because there was no proof of the profits made by Allstate from its improper deductions. *See* slip op. at 16 ("Where punitive damages are based on wrongful corporate policies which are profit oriented, the supporting evidence must go far beyond informed speculation."). The court of appeals found the only reference to either the number of total loss claims adjusted by Allstate or the amount of illicit profits was by Hawkins' counsel when he suggested to adjuster Schwenk that if Allstate improperly deducted $35 from 100,000 total loss claims, Allstate would gain $3.5 million.[9]

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[9] "Q. [Hawkins' counsel] My question was, this decision to take $35 off on every total loss for car cleanup is really quite an important

The court of appeals appears to have carved out a new requirement of proof to support a punitive damage award. Neither the court of appeals, the parties, nor our research reveals any authority that proof of ill-gotten gains is necessary for an award of punitive damage. *See* Moore v. American United Life Ins. Co., 150 Cal.App.3d 610, 197 Cal.Rptr. 878 ($2.5 million punitive award for insurance company's bad faith upheld without evidence of the profits from company's deceptive claims practices); Chodos v. Ins. Co. of North America, 126 Cal.App.3d 86, 178 Cal.Rptr. 831 ($200,000 punitive award upheld in light of insurer's wealth and nature of its acts, without proof of profits derived from insurer's appraisal practices). Indeed, Allstate admits that the "[a]ppellants were not required to present evidence of illicit profits to obtain an award of punitive damages." Appellee's Supplemental Brief at 34.

Allstate argues that once Hawkins "intentionally released the specter of illicit profits" to solicit punitive damages, Hawkins must present more than speculative proof of such profits. Allstate suggests that the $3.5 million punitive damage award "bears more than a casual resemblance" to the amount Hawkins' counsel hypothetically suggested Allstate would gain from improperly deducting $35 from 100,000 total loss claims. *See ante* at n. 8. In effect, Allstate contends Hawkins did not meet its burden of producing evidence that establishes a reasonable basis from which the jury could estimate damages.

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decision from the company's standpoint; isn't that true?

A. [Schwenk] I would say so, yes.

Q. As a matter of fact, we could figure it out mathematically. If Allstate has 100,000 total loss claims every year, and they take $35 off on each one of those, that amounts to $3,500,000; doesn't it?

Q. If you say so. I can't figure that far.

Q. If Allstate has one million total loss claims every year in the United States, if we figure it out mathematically, it would amount to a 35 million decision; isn't that right?

A. Yes."

We agree that a damage award, punitive or otherwise, must be based on more than mere speculation or conjecture. However, we disagree that the punitive damage award in this case is the result of speculation or not justified by the evidence.

Arguably, if it were the only evidence from which to determine an appropriate award, a hypothetical suggestion of the profitability of a defendant's conduct would result in an award based merely on speculation. However, ample evidence was presented in this case from which the jury could assess an amount of punitive damages that would accomplish the dual goal of punishment and deterrence.

We vest the trier-of-fact with discretion to award an amount of punitive damages that, in its judgment, will punish the defendant and serve as an example to deter future similar misconduct. Once exercised, this discretion should not be disturbed unless the award is the result of passion or prejudice. Nielson v. Flashberg, 101 Ariz. at 341, 419 P.2d at 520. The appropriate test of passion or prejudice is whether the verdict is "so manifestly unfair, unreasonable and outrageous as to shock the conscience of the court." Acheson v. Shafter, 107 Ariz. at 579, 490 P.2d at 835 (citing Young Candy & Tobacco Co. v. Montoya, 91 Ariz. 363, 370, 372 P.2d 703, 707 (1962); *accord* Linsenmeyer v. Hancock, 23 Ariz. App. 444, 448, 533 P.2d 1181, 1185 (1985) (quoting Wry v. Dial, 18 Ariz. App. 503, 515, 503 P.2d 979, 991 (1972) ("The test to be applied . . . is whether the 'verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice.'")). The amount of the award alone is not sufficient evidence to prove the jury acted with passion or prejudice. Nienstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885.

The previously outlined categories of evidence relevant to assess a sum of punitive damages *see ante* at 13–14, are equally applicable to determine whether sufficient evidence supports the $3.5 million award. A plaintiff is not

required to put on proof of every factor, nor is any single factor a prerequisite to recovery of punitive damages. *See* Nienstedt v. Wetzel, 133 Ariz. at 357, 651 P.2d at 885 (evidence of defendant's wealth not required to recover punitive damages). Rather, the plaintiff must produce evidence so that the amount awarded may not be said to be "so unreasonable in regard to the circumstances as to show the influence of passion or prejudice." Nielson v. Flashberg, 101 Ariz. at 341, 419 P.2d at 520.

We find that the amount of punitive damages awarded against Allstate is neither so excessive nor unreasonable in light of the circumstances as to show the influence of passion or prejudice. First, the $3.5 million punitive damage award is not disproportionate to Allstate's financial position. It is axiomatic that the wealthier the wrongdoing defendant, the greater the award of punitive damages necessary to punish him. Maxwell v. Aetna Life Ins. Co., 143 Ariz. 205, 219, 693 P.2d 348, 362 (App. 1984). We recognize, however, that the award must not financially kill the defendant. *Id.* Allstate's 1981 Annual Statement reported total assets of $8.6 billion, unassigned (surplus) funds of $2.4 billion, and net income of $346.7 million. The jury's award represents approximately 3-1/2 days' net income or 1/25 of 1% of total assets. This court, as well as others, has upheld punitive damage awards representing a greater percentage of the defendant's wealth against claims of excessiveness. *See* Acheson v. Shafter, 107 Ariz. 576, 490 P.2d 832 (1971) (award representing 5% of net worth upheld); *accord* Dodge City Motors v. Rogers, 16 Ariz. App. 24, 490 P.2d 853 (1971) (award representing 2+ weeks' net income and 4% net worth upheld);[10] Moore v. American United Life Ins. Co., 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984) (award representing 3.4 weeks of

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[10] The net worth and income amounts are not set forth in the reported decision but are contained in the record. *See* Maricopa Superior Court Case No. C-222384; Appellee's brief in CA-CIV 1457.

defendant's income and 3.2% of net assets upheld); Wetherbee v. United Ins. Co., 18 Cal.App.3d 266, 271, 95 Cal.Rptr. 678, 681 (1971) (award equal to one week's after-tax earnings upheld). *Cf.* Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 824, 169 Cal.Rptr. 691, 620 P.2d 141 (1979) (award reversed where it represented more than seven months of net income), *cert. denied and appeal dismissed*, 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980); Merlo v. Standard Life and Acc. Ins. Co., 59 Cal.App.3d 5, 130 Cal.Rptr. 416 (1976) (punitive award constituting nearly one-third of defendant's net worth set aside).

Second, the amount of punitive damages is not outrageous or excessive in light of the particular nature of Allstate's conduct. In general, the more reprehensible the defendant's conduct and the more serious the harm likely to occur, the larger the appropriate punishment. *See ante* at 13–14. The jury could have rationally concluded that Allstate's conduct was highly reprehensible and resulted in harm to countless insureds. The jury reasonably could have concluded that Allstate engaged in deceptive claims practices spanning up to 18 years whereby Allstate took advantage of its insureds' predicaments to settle claims at lesser amounts by deducting relatively small, innocuous amounts from each total loss claim under the guise of cost saving. The jury could have found this conduct particularly reprehensible because the average insured would be unlikely to discover or prosecute this misconduct, *see* Moore v. American Life Ins. Co., 150 Cal.App.3d at 637, 197 Cal.Rptr. at 895, and the deceptive practices were established company policy.

We hold that evidence of Allstate's wealth, the reprehensibility and duration of its conduct, and the potential effect on innumerable claimants is sufficient to support the $3.5 million punitive damage award.

IV. CONSTITUTIONAL CHALLENGE

After oral argument and after our order granting the Hawkins' Petition for Review "on the issues set forth therein," filed May 2, 1986,[11] we granted Allstate's request to file supplemental briefs. Order (filed May 28, 1986). Allstate stated that the following reasons necessitated supplemental briefing:

> A. It has been more than three years since the parties briefed the issues on appeal.
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> B. Significant developments in Arizona law relating to punitive damages have occurred since the filing of appellate briefs.
>
> C. Since oral arguments were heard before the petition for review was granted, the entire record was presumably unavailable at the time of arguments and supplemental reference to the record is necessary and appropriate.
>
> D. Questions by the court at oral argument suggest that clarification of certain critical evidentiary facts may be necessary.

Motion for Leave to File Supplemental Briefs and For Additional Oral Argument (filed May 16, 1986).

In its discussion of reason "B," Allstate pointed to three recent Arizona Court of Appeals cases relating to punitive damages and also requested "that this court allow additional briefing on the federal constitutional implications of the manner in which this punitive damage award was imposed under Arizona law." *Id.* at 5–6. Allstate ultimately argued in its Supplemental Brief that punitive damages

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[11] We heard oral argument before accepting review to determine whether this case raised issues not presented by two other cases previously accepted for review: Rawlings v. Apodaca, ___ Ariz. ___, 726 P.2d 565 (1986); Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986).

are a criminal penalty, which entitle a civil defendant to the same constitutional protections as a criminal defendant (e.g., proof beyond a reasonable doubt, protection against double jeopardy, privilege against self-incrimination, and conviction by a unanimous jury in Arizona) and, in the alternative, that procedural due process requires clear and convincing proof of entitlement to punitive damages.

Allstate acknowledges that the question of the constitutionality of punitive damage awards was not raised at trial, but argues that this issue properly may be raised for the first time on appeal because it involves issues "of a general public nature, affecting the interests of the state at large." Appellee's Supplemental Brief at 35 (citing Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 583, 84 P.2d 581, 584 (1938)). We agree that issues of "general statewide significance" are an exception to the general rule that an appellate court will not consider issues not raised in the trial court. *E.g.*, Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984). However, this general rule and its exception are rules of *procedure*, not matters of jurisdiction, established for the purpose of orderly administration and the attainment of justice. Town of South Tucson v. Board of Supervisors, 52 Ariz. at 582–83, 84 P.2d at 584. "Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power." *Id.* (quoting Cappon v. O'Day, 165 Wis. 486, ____, 162 N.W. 655, 657 (1917)). Thus, while we agree that this court has the power to consider the constitutional issues raised by Allstate, we decline to exercise that power in this case.

Efficient and orderly administration requires some point in time at which it is too late to raise new issues on appeal. We note that Allstate did not raise its constitutional arguments in the pleadings, post-trial motions, court of

appeals, petition (or cross-petition) for review, response to petition for review, or at oral argument. Allstate first voiced its constitutional concerns after the issues for review by this court were set by our order granting the petition for review. In light of this procedural history, we believe it does not promote sound appellate practice to consider issues so belatedly urged. Our order allowing issues accepted for review and was premised on the parties' need to update its briefs filed three years earlier.

We hold that consideration of a constitutional issue raised for the first time on appeal is discretionary with this court. This is not a case involving denial of a fundamental constitutional right in a criminal trial nor contentions which affect the jurisdiction of the court, and we do not feel compelled to exercise our discretion.

Our decision to decline consideration of the constitutionality of the manner in which punitive damages were imposed is bolstered by our recent adoption of the clear and convincing standard of proof Allstate seeks. Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675, 681 (1986) (recovery of punitive damages "only upon clear and convincing evidence of defendant's evil mind"). Our decision to require a more stringent standard of proof for punitive damages than for compensatory damages was grounded on policy, not constitutional, considerations. *Id.* at _____, 723 P.2d at 680–81 (higher burden of proof necessary to preserve deterrent effect and prevent oppressiveness of loosely-assessed punitive damages).

V. RETROACTIVITY OF CLEAR AND CONVINCING BURDEN OF PROOF

Here, the jury was instructed that it could award punitive damages in its discretion if a preponderance of the evidence established conduct by Allstate that warranted such damages. Because we decline to consider whether the clear and convincing burden of proof is constitutionally required, the question we must address is whether the

clear and convincing burden of proof for punitive damages announced in *Linthicum* applies retroactively to the dispute *sub judice*.

In Arizona, a civil opinion is presumed to operate retroactively, as well as prospectively, unless otherwise stated. Brannigan v. Raybuck, 136 Ariz. 513, 520, 667 P.2d 213, 220 (1983) (citing Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 435, 641 P.2d 1275, 1279 (1982)). To overcome this presumption of retroactive application, Arizona utilizes the three factors set forth by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, ____(1971):

> (1) Whether the decision establishes a new legal principle by either overruling clear and reliable precedent or deciding an issue whose resolution was not clearly foreshadowed;
>
> (2) Whether retroactive application will further or retard operation of the rule, considering its prior history, purpose and effect; and
>
> (3) Whether retroactive application will produce substantial inequitable results.

See Brannigan v. Raybuck, 136 Ariz. at 520, 667 P.2d at 220; Chevron Chemical Co. v. Superior Court, 131 Ariz. at 436, 641 P.2d at 1280; Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 313, 560 P.2d 1216, 1220 (1977). These factors are sometimes referred to as the reliance, purpose, and inequity factors, respectively.

The reliance factor strongly favors prospective-only application. *Linthicum* announced a new principle of law that overruled clear and reliable precedent. Proof by a preponderance of the evidence is the traditional measure of proof for most civil cases. *See* Schwalback v. Jones, 27 Ariz. 260, 232 P. 558 (1925); E. Cleary, *McCormick on Evidence* § 339, at 956 (3d ed. 1984). Our research reveals no reported Arizona decisions foreshadowing this change;

indeed, none even broaches the subject of a higher burden of proof for punitive damages.

Regarding the purpose factor, retroactive application of the new clear and convincing burden of proof standard would not "affect adversely the purpose behind the new rule." *See* Chevron Chemical Co. v. Superior Court, 131 Ariz. at 436 641 P.2d at 1280 (restating *Chevron Oil Co. v. Huson's* second factor). An important purpose of the more stringent burden of proof is to assure that punitive damages are properly awarded. The higher burden of proof underscores that punitive damages are an extraordinary remedy, to be assessed only in "the most egregious of cases." *Linthicum*, 150 Ariz. at ____, 723 P.2d at 681. The effect of the *Linthicum* rule is to allow the trier of fact to impose punitive damages only where he is convinced to a higher degree of probability that the defendant possessed the requisite evil mind. Applying this new rule retroactively obviously would not impair the purpose of the rule; however, neither would retroactive application significantly further its purpose. Current practice provides several avenues of review to assure that an award of punitive damages is justified: the plaintiff must get past a motion for a directed verdict, the jury must exercise its discretion to award punitive damages, the verdict is subject to post-trial motions and review by the trial judge, and the judgment is subject to appeal. All of these procedures are designed to assure that the award is justified and not the result of the jury's passion or prejudice.

The inequity factor also neither strongly favors nor disfavors prospective-only application of the change in law. This factor is closely related to the reliance factor and focuses on the injustice or hardship resulting from retroactive application of the new rule. *See* Peagler v. Phoenix Newspapers 114 Ariz. at 313, 560 P.2d at 1220. Retroactive application of the new burden of proof would force further litigation in this and other lawsuits similarly situated, where the parties have prepared and presented their

cases in reliance upon clear precedent and with adequate protection against an improper award of punitive damages. Requiring plaintiffs to retry cases under a higher burden of proof where the passage of time will have impaired considerably their ability to discover evidence and prove their case certainly works an injustice. On the other hand, plaintiffs are not entitled to punitive damages as a matter of right; and, theoretically, they are fully compensated for their actual injury by the compensatory damage award. Arguably then, retroactive application creates only a minor hardship and goes one step further in assuring properly awarded punitive damages.

Whether retroactive application is inappropriate if a single factor favors prospective application, or whether all factors must favor prospective application, is unclear. *See* Brannigan v. Raybuck, 136 Ariz. at 521, 667 P.2d at 221 ("[E]ven if three-part test of *Chevron Oil Co. v. Huson* is interpreted liberally, so that the proponent of prospective application is not required to satisfy all three elements, ..."); Chevron Chemical Co. v. Superior Court, 131 Ariz. at 436–37, 641 P.2d at 1280–81 (decision given retroactive application where all three factors were satisfied); Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (looked only to lack of substantial inequitable results to conclude retroactive application proper). *See generally* Note, Confusion in Federal Courts: Application of the *Chevron* Test in Retroactive-Prospective Decisions, 1985 U. Ill. L. Rev. 117. However, we need not establish a precise formula for applying these factors. Whether a judicial holding will be given only prospective application is a question of policy. *See* Lemieux v. Superior Court, 132 Ariz. 214, 644 P.2d 1300 (1982) (United States Constitution does not restrict retrospective-prospective decision of state courts).

In this case, we are faced with a judicial decision announcing an unforeshadowed departure from clear and reliable precedent. We are concerned with the potential burden on the judicial system from further litigation where

claims have been disposed of by prior litigation or settlement. *See* Harmann v. Hadley, 128 Wis.2d 371, ____, 382 N.W.2d 673, 677 (1986). Under these circumstances, we hold that the new burden of proof shall be given only prospective application. After September 15, 1986, the date *Linthicum* was mandated, punitive damages are recoverable only upon clear and convincing evidence of a defendant's evil mind.

The new burden of proof shall not apply where a verdict or judgment based upon proof by a preponderance of the evidence has been entered and where there is no reason to require a new trial other than application of the new burden of proof. *See* Wangen v. Ford Motor Co., 97 Wis.2d 260, ____, 294 N.W. 2d 437, 458 (1980). *Cf.* Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) (higher standard of proof given retroactive application where prior case law gave notice of intent to reexamine burden of proof).

The opinion of the court of appeals is vacated. The verdict for compensatory and punitive damages is affirmed and the matter is remanded for reinstatement of the original judgment dated August 3, 1980.

FRANK X. GORDON, JR.
Chief Justice

CONCURRING:

STANLEY G. FELDMAN
Vice Chief Justice

BRUCE MEYERSON
Judge Pro Tempore, Court of
Appeals, Division One

Justice James Duke Cameron recused himself and did not participate in the determination of this matter, and Bruce Meyerson, Judge Pro Tempore, Court of Appeals, Division One, sat in his place and stead.

Justice Jack D. H. Hays participated in the determination of this matter but retired before this opinion was filed.

HOLOHAN, Justice dissenting

The concept of punitive damages has been the subject of considerable controversy among legal scholars. Punitive damages are not allowed in some states; in others, restrictive rules have been developed to control such damages. The entire concept of punitive damages has been subjected to attack from some sources. RESTATEMENT (SECOND) OF TORTS § 908 comment f (1965). This court in Rawlings v. Apodaca, 151 Ariz. ____, 726 P.2d 565 (1986), and Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986), narrowed the field of conduct justifying punitive damages and adopted a higher standard of proof to justify the imposition of punitive damages. These reforms should not be viewed as the end of the reexamination of the concept of punitive damages.

The action by the court in this case in declining to apply the *Linthicum* standard of proof retroactively does not appear justified. The three factors of reliance, purpose and inequity, adopted in Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982), for the retroactive-prospective analysis, weigh heavily for retroactive application of the *Linthicum* rule. Reliance on the old rule is the only factor which favors prospective application. The purpose of the new rule to avoid loosely assessed punitive damage favors retroactive application. Finally, the factor of inequity does not favor the plaintiffs because there is no particular right to punitive damages—they are a windfall. Punitive damages are a discretionary matter with the jury, and a retrial of the punitive damage issue does not deprive the plaintiffs of their right to compensatory damages—which are the only damages they had a right to recover.

From my review of the *Chevron* factors I conclude that they weigh in favor of the usual rule in civil cases of retroactive application. I therefore dissent from the decision of the court.

There is also another matter which deserves comment. The compensatory damage award in this case is $15,000, but the punitive damage award is $3.5 million which is three and one-half times the maximum fine which could have been imposed upon the defendant if it had been convicted of a felony. *See* A.R.S. § 13-803(A)(1) (Supp. 1986). The amount of the award in this case is a clear illustration of the penal nature of such damages. The court, however, declines to consider the constitutional issues raised by the defendant concerning the current procedures for assessing punitive damages. I believe that this case presents the right opportunity for the court to consider the constitutionality of our procedures in determining and assessing punitive damages.

Two notable law review articles discuss a number of the constitutional issues arising from the current procedure employed by a number of states in determining and assessing punitive damages. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L. Q. 241 (1985). Essentially, the authors agree that punitive damages are penal in nature and require a due process procedure greater than that required for civil matters but not as strict as that required for criminal matters. The authors note that juries are usually given no standards to guide them in assessing the amount of punitive damages. They are told that the purpose of punitive damages is to punish the defendant and to deter others. This is also the purpose of the criminal law. Unlike the criminal law, however, there are no defined limits to the punishment in the instance of punitive damages. The jury's discretion is virtually unlimited save and except for the occasional finding by an appellate court that the award was manifestly unfair, unreasonable or outrageous so as to shock the conscience of the appellate court. The authors conclude that such broad unguided discretion

does not meet due process requirements for the assessment of what is in fact a criminal penalty.

At least three minimum requirements have been suggested as necessary for punitive damage procedures to meet due process standards: (1) the procedure should be bifurcated from the compensation portion of the case; (2) proof of the right to punitive damages should be by clear and convincing evidence; and (3) the maximum amount for punitive damages should be established by law. Wheeler, *supra*.

The United States Supreme Court has not directly addressed the issue of procedural due process for assessing punitive damages. That court has noted that the due process clause protects civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). On another occasion it has observed that in most jurisdictions jury discretion over the amounts awarded is limited only by the general rule that punitive damages not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. Juries remain free to use their discretion selectively to punish or not punish. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Last year in Aetna Life Insurance Co. v. Lavoie, ____ U.S. ____, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), the court acknowledged that challenges to the constitutionality of the lack of standards for the award of punitive damages raised important issues which, in an appropriate setting, must be resolved. The case was, however, decided on another basis which made it unnecessary for the court to resolve the challenge to the award of punitive damages.

No purpose can be accomplished by delaying a decision on the important issues raised by the defendant's challenge

to the constitutionality of our present procedure for awarding punitive damages.

In *Linthicum* this court adopted the higher standard of proof to establish a claim for punitive damages. This action brings us part of the way towards meeting the suggested due process standards for assessing punitive damages. The mechanism for meeting another requirement—bifurcated trial—is already in place. Arizona Rule of Civil Procedure 42(b), 16 A.R.S. permits separate trials of claims on any issue. A claim for punitive damages could and should be separated from the other issues in the case and tried separately after the plaintiff has prevailed on the issues for compensatory damages. The same jury which heard the first phase of the case could hear the second phase dealing with the punitive damages issue.

The only matter of real controversy is whether due process requires that limits be placed on the maximum amount which may be awarded for punitive damages. There appears to be strong arguments for the position that due process requires such maximum limits because of the penal nature of punitive damages. In any event, the issue should be considered and resolved.

The constitutional issues raised in this case will not disappear. Other counsel faced with the problem will, perhaps, make a better record, but ultimately this court must decide the issues. The case presented the opportunity for this court to resolve the challenges to the constitutionality of the Arizona procedure for awarding punitive damages. The decision of the court leaves the matter in doubt and speculation.

WILLIAM A. HOLOHAN, Justice

IN THE COURT OF APPEALS
STATE
OF ARIZONA
DIVISION ONE

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1 CA-CIV 6881
Department A

JACK RANDY HAWKINS and CYNTHIA HAWKINS, husband and wife,
Plaintiffs-Appellants,

vs.

ALLSTATE INSURANCE COMPANY, a foreign corporation, and DOES I through V,
Defendant-Appellee.

MEMORANDUM DECISION
(Not for Publication, Rule 28, Arizona Rules of Civil Appellate Procedure)

An Appeal from the Superior Court for Maricopa County
Cause No. C-432754
The Honorable David J. Perry, Judge
AFFIRMED IN PART; REVERSED IN PART; REMANDED

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Filed Aug 13 1985

CORCORAN, Judge

Appellants, Jack and Cynthia Hawkins, in a two-count tort action alleging bad faith and fraud in the resolution of an auto insurance claim, appeal from the trial judge's grant of a motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The Hawkins had obtained a jury verdict for $15,000 compensatory damages and $3,500,000 punitive damages. We must decide whether the trial court erred in its assessment of the evidence as to both type of damages, and if so, also erred as to the grant of a new trial.

1. The Facts

In July, 1979, the Hawkins purchased a new Chevrolet Monte Carlo, which included many options, for just over $8,000. On December 4, 1979, Cynthia had an accident which resulted in damages to her car totaling $6,900. The Hawkins were insured under a standard Allstate automobile liability insurance policy. The collision provision limited Allstate's liability to the actual cash value of the car, or replacement with a car of like kind or quality.

Cynthia reported the accident to her agent the day it occurred. Once Allstate determined that the actual cash value of the insured car was less than the estimated cost of repair, it was classified as a "total loss" and transferred to a total loss adjuster, Paul Schwenk. Schwenk contacted the Hawkins on December 13, 1979. The Hawkins indicated to Schwenk that they wanted a replacement car. Schwenk sent the Hawkins to look at four similar Monte Carlos at a local car dealership. The Hawkins chose one of the vehicles but were told that they could not have it

because its actual cash value was $300 more than their insured car. Schwenk told the Hawkins they would have to take one of the other cars or $4,500 in cash. On December 20, 1979, Schwenk brought the Hawkins a check for $6,471, payable to the Hawkins and Midway Chevrolet, intending that they purchase the car he had selected. After an acerbic exchange between Jack and Schwenk, the Hawkins reluctantly accepted the replacement vehicle. The replacement vehicle lacked power windows, got worse gas mileage due to a more powerful engine, had dealer (rather than factory) installed cruise control, and lacked several styling features of the original car. There was no evidence produced at trial concerning the actual cash value of the insured vehicle or the replacement vehicle at the time of the accident. Calculations based on the "list price" of the vehicles indicate a difference of several hundred dollars. Taking into account all of the amounts paid, Allstate concedes the difference in list price between the insured vehicle and replacement was at least $161.45 in favor of Allstate.

At trial, the Hawkins testified as to their dealings with Allstate, and also called three former Allstate adjusters. The latter group testified as witnesses rather than as expert witnesses. One adjuster testified as to Allstate's claim procedures in Phoenix from 1962 until 1964; another spoke to its practices in Tacoma, Washington, from 1978 to 1981; and the last described the practice at the Phoenix office at the time the Hawkins'claim was processed. Each testified to Allstate's methods of determing the loss to the insured, termed "chiseling" by the Hawkins and "cost saving" by Allstate.

At the conclusion of the trial, the trial judge directed a verdict in favor of Allstate on the fraud complaint and submitted the bad faith claim to the jury on both compensatory and punitive damages. The jury returned a verdict for the Hawkins. The court subsequently granted Allstate's motion for judgment notwithstanding the verdict

on the basis that there was insufficient evidence presented at trial to justify the verdict. It further granted Allstate's motion for a new trial, in the alternative, for the following reasons: (1) the verdict was not supported by the evidence; (2) the verdict was the result of passion or prejudice; (3) the damages were excessive; (4) the court erred in admitting the testimony of the former Allstate employees; and, (5) the court erred in instructing the jury on the nature of bad faith, the duty owed by Allstate to the Hawkins, and the extent of the damages.

The Hawkins appeal from the judgment notwithstanding the verdict and the order for a new trial, and from the directed verdict on the fraud count. The fraud issue was not addressed in the briefs or in oral argument and we deem it abandoned.

2. Standard of Review

On appeal, the standard of review for a judgment notwithstanding the verdict favors the appellant, whereas his burden is greater in showing that the trial court should also not have ordered a new trial. If there is substantial evidence from which reasonable minds could differ as to the ultimate facts, a motion for judgment notwithstanding the verdict should be denied. *Times Mirror Co. v. Sisk*, 122 Ariz. 174, 593 P.2d 924 (App. 1978). On the other hand, an appellate court will not disturb an order granting a new trial in the absence of a clear showing of abuse of discretion. *Suciu v. Amfac Distrib. Corp.*, 138 Ariz. 514, 675 P.2d 1333 (App. 1983). We discuss separately the pertinent evidence as to the judgment and the order.

3. Testimony of Former Allstate Employees

The Hawkins contend that the trial court erred in its post-trial determination that the testimony of former Allstate employees was inadmissible. They argue that it was properly received pursuant to rule 404(b), Arizona Rules

of Evidence, to show motive (profit), knowledge (that its agents knew of the company's policies), and state of mind (that it expressly intended to engage in the practices which were the subject matter of the suit). They also contend that it was admissible to show a pattern.

Rule 404(b) is a specialized exception to the general rule excluding circumstantial use of character evidence. 1 M. Udall and J. Livermore, *Arizona Practice: Law of Evidence* § 84 (2d ed. 1982). It is primarily invoked in criminal cases but its use in civil litigation is permitted. *E.g., Sequoia Mfg. Co. v. Halec Constr. Co.,* 117 Ariz. 11, 570 P.2d 782 (App. 1977); *American Hot Rod Ass'n v. Carrier,* 500 F.2d 1269 (4th Cir. 1974); 10 *Moore's Federal Practice* § 404.21[2] (2d ed. 1985). Such testimony generally tends to prove culpability where the defendant acknowledges an act but claims it was unintentional, or it shows a compelling situational similarity with past acts that it makes it more likely that the defendant was the perpetrator. Allstate does not deny its acts nor does it claim that they were unintentional. Therefore, we believe this rule is inapplicable.

The pertinent query is whether the testimony is relevant. *But see Dunlap v. Jimmy G.M.C.,* 136 Ariz. 338, 666 P.2d 83 (App. 1983) (holding that evidence of past unethical sales practices is relevant on the issue of whether defendant was currently involved in deceptive sales practices and on the issue of punitive damages). *Plaintiffs, alleging a pattern of behavior which taken as a whole constitutes bad faith may use indirect evidence to support an award of punitive damages. Colonial Life & Acc. Ins. Co. v. Superior Court,* 31 Cal.3d 785, 183 Cal.Rptr. 810, 647 P.2d 86 (1982). In *Moore v. American United Life Ins. Co.,* 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984), the court held that evidence of another insured's claim was admissible to establish a pattern or practice of unreasonable behavior. In its analysis, the California court stated the antecedent practice must be substantially similar to the case before the trial court. We agree.

The first former adjuster testified in very general terms as to Allstate's claim practice 20 years ago.

> Q. Did they [Allstate] have a general policy regarding claims handling?
>
> A. Yes, they did.
>
> Q. What was that general policy?
>
> A. They were interested in settling claims for as low a dollar possible. Oftentimes, again, if they could save the company money, or if the adjuster could, you were doing a good job.
>
> Q. In other words, you were praised if you could cut a claim down below its true value?
>
> A. Well, it's difficult to determine what it's true value is, that's always a matter of opinion. But you felt you were saving the company money for what the claimant desired to settle his claim for, then you were doing a good job.

This testimony is not sufficiently similar to the Hawkins' experience; rather, it resembles character evidence which is not admissible for the purpose of proving that Allstate acted in a specific manner on a particular occasion. Rule 404(a), Arizona Rules of Evidence. This testimony was improperly admitted.

The second and third former adjusters testified in detail regarding company procedures for handling total loss claims. Although neither had any direct experience with the Hawkins' claim, each described deductions and settlement practices that were nearly identical to those in the Hawkins' adjustment. Nonetheless, the trial court ultimately ruled their testimony inadmissible without stating any reason. A trial court's rulings on exclusion or admission of evidence will not be disturbed on appeal unless clear abuse of discretion appears and prejudice results.

Selby v. Savard, 134 Ariz. 222, 655 P.2d 342 (1982). However, counsel must state each specific ground of objection. *Cf. State v. Evans*, 88 Ariz. 364, 373, 356 P.2d 1106, 1111, cert. denied, 371 U.S. 835 (1960). Our review of the record indicates no substantial objections to the adjusters' testimony, other than those pertaining to relevancy which we answered adverse to Allstate's position. An objection as to relevance may constitute a waiver of other specific grounds of objection. *See Killingsworth v. Nottingham*, 18 Ariz. App. 356, 501 P.2d 1197 (1972); 1 M. Udall and J. Livermore, *Arizona Practice: Law of Evidence* § 12 (2d ed. 1982); *McCormick on Evidence* § 52 at 129 (3rd Cleary ed. 1984). For the remainder of this decision we will refer to the testimony of those witnesses where relevant.

4. Bad Faith: Compensatory Damages

Under this bad-faith claim, the Hawkins were required to prove that Allstate violated the implied promise of good faith and fair dealing which an insurance company owes to its insured. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127 (App. 1982). The promise carries the obligation to process claim applications in a timely and thorough manner. A plaintiff must show, on the basis of an objective standard, that an insurer unreasonably denied or delayed payment of a claim under the facts and circumstances of the case. *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981); *Continental Life & Acc. Co. v. Songer*, 124 Ariz. 294, 603 P.2d 921 (App. 1979). Allstate contends that the Hawkins did not meet their burden of proof on several grounds.

Allstate first argues that it neither failed nor delayed payment of the claim. It points to the fact that it provided a replacement vehicle with a retail value of 97.5% of the insured car within 14 days of the loss. In offering these facts as dispositive of one of the core issues, Allstate implicitly assumes that the final sum paid is the only criterion, and that shaving a point here or there is not bad

faith. We believe Allstate construes this tort too narrowly: it is a cause of action which arises out of contract but stands on an independent footing as a means to redress injuries which occur when an insurer unreasonably refuses to recognize a valid claim. *Noble v. National Am. Life Ins. Co., supra.* Unlike other contracts in which the parties seek pecuniary advantage, an insurance contract protects in the event of a calamity. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 157 Cal.Rptr. 482, 487, 598 P.2d 452, 457 (1979). Therefore, when an insured, who has already suffered an accident or other misfortune, has also been forced to jump through his own insurer's hoops to receive the policy benefits, the trier of fact must look beyond the bottom line to the facts and circumstances of the claims transaction in determining whether there was a breach of good faith. *See* Comment, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co.*, 25 Hastings L.J. 699 (1974). Where, as in this case, an insurer presents an offer significantly below the amount it actually settles for, the offer is made in a take-it or leave-it fashion, and there are other hard-ball tactics, sufficient evidence is present to go to the jury on bad faith.

Allstate next contends that a breach of contract action is the gravaman of a bad faith claim. It relies upon language from *Sparks*, 132 Ariz. at 539, 647 P.2d at 1137, that the trial court's determination of a breach, taken in conjunction with other facts, is sufficient to take the matter to the jury. We disagree with this procedural interpretation. It goes without saying that where an insurer fully complies with the provisions of its contract in a timely manner there can be no bad faith; however, to require the plaintiff to first plead and prove a breach of contract claim is both inefficient and ignores the policy behind the bad faith tort. The plaintiff must offer evidence which would constitute breach of contract if so pleaded, but this is not a pleading requirement nor is it necessary for the trial court to so find. *See Safeco Ins. Co. v. Sims*, 435 So.2d

1219, 1224-1225 (Ala. 1983) (Jones concurring). Allstate's concession that the value of the replacement car was less than the value of the insured car satisfies this element.

We hold that the trial court erred in granting Allstate's motion for judgment notwithstanding the verdict as it applies to the award for compensatory damages. As discussed above, we agree with the trial court's determination that the general testimony of an adjuster from 20 years ago is not relevant without more to establish a pattern of bad faith. Therefore, we affirm the trial court's grant of the alternative motion for a new trial on the basis that the trail court improperly admitted testimony.

5. Bad Faith: Instruction

The trial court also concluded that it erroneously instructed the jury on "the nature of bad faith, the duty owed by the defendant to plaintiffs, and the extent of damages." We address this issue for the guidance of the parties at the new trial.

The principal instruction given to the jury defining the tort of bad faith read as follows:

> Every insurance contract contains an implied promise of good faith and fair dealing which the insurance company owes to its insured. This promise imposes an obligation on the insurance company to deal fairly in handling a claim made by its insured under the policy; and to not unreasonably delay, withhold, or fail to make full payment of promised benefits to its insured. Reasonableness is to be determined on the basis of whether the conduct of the parties was justified and reasonable under all of the circumstances.

Allstate first contends that the language "failed to make full payment of promised benefits," implies that the simple payment of less than full benefits constitutes bad faith.

We do not read this instruction so narrowly; further, we have discussed and resolved the issue of partial payment of benefits in relation to Allstate's contention that a breach of contract was neither pleaded nor proven.

Allstate next contends that the jury should have been instructed on intent. While acknowledging that our Supreme Court has held that "[a] jury need not be specifically instructed that an intent element is necessary to establish the tort of bad faith," *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. at 538, 647 P.2d at 1136, Allstate characterizes *Sparks* and *Noble* as involving a clear intent on the part of the insurer to deny the claims. We do not agree. The evidence supports the inference that Allstate fully intended to pay the amount offered, or replace the Hawkins' car with a vehicle equal to the amount offered. Since, as Allstate now acknowledges, the value of the replacement vehicle was less than the insured vehicle, the determination by the trier of fact turns on "whether the insurer failed to honor a claim without a reasonable basis for doing so." *Sparks*, 132 Ariz. at 538, 647 P.2d at 1136. The instruction correctly informed the jury that failure to make full payment of the contracted benefits must be unreasonable under all of the circumstances to justify a finding of bad faith. We find no error in the jury instruction.

6. Bad Faith: Punitive Damages

Our conclusion that there was sufficient evidence to take the matter to the jury on compensatory damages does not necessarily apply to punitive damages. Bad faith which is sufficient to support a punitive damages award must reflect conduct in excess of the reckless disregard that is needed to support the bad faith claim. *Farr v. Transamerica Occid. Life Ins. Co.*, ___Ariz.___, 699 P.2d 376 (App. 1984). There must be a showing of motive and intent indicative of aggravation, insult, vindictiveness, or malice. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 686, 271 N.W.2d 368, 379 (1978).

The Hawkins first argue that the behavior of the claims adjuster was egregious, supporting the award of punitive damages. They do not serious pursue this line of argument, as neither do we, but instead concentrate on their primary contention that the punitive award bore a reasonable relationship to the nature of the misconduct, Allstate's profit from such misconduct, its history, wealth, and income, and the deterrent effect. We agree with the Hawkins that the purpose of punitive damages is not only to punish the offender, but also to serve as a deterrent to others. *Price v. Hartford Acc. & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Pistorious v. Prudential Ins. Co.*, 123 Cal.App. 3d 541, 176 Cal.Rptr. 660 (1981); D. Dobbs, *Law of Remedies* § 3.9 (1973). As noted in the *Restatement (Second) of Torts* § 908, (1979) the purpose of punitive damages is "to deter him and others like him from similar conduct in the future." The California Supreme Court has concluded, and we agree, that punitive damages may serve a particular purpose in instances of bad faith:

> [T]he principal purpose of . . . [punitive damages] is to deter acts deemed socially unacceptable and consequently, to discourage their perpetuation of objectionable corporate policies.
>
> . . . .
>
> As one commentary has noted, "the insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of de-

> cency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship.

Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 820, 157 Cal.Rptr. 482, 487, 598 P.2d 452, 457 (1979), *cert. denied.*, 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980). *See also, Walker v. Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961).

Allstate contends that punitive damages should be limited to cases in which there was an actual intent to cause injury, an evil motive, horrendous injuries, or flagrantly oppressive conduct by the insurer. We believe that "oppressive conduct" as set out in *Farr* encompasses a corporate policy, sufficient to constitute a pattern, whereby an insurer chisels an amount small enough from each claimant such that only the occasional person will object and litigate the matter.

The testimony concerning Allstate's corporate policies came from Schwenk and the three claims adjusters. Schwenk testified that in his initial work-up of the value of the car he deducted a $35 "clean-up fee." Further, he was instructed by his supervisor to always deduct some amount for clean-up on a total loss.

While the clean-up fee was not actually deducted from the Hawkins' settlement because it was not a cash settlement, it would lower the amount that Allstate would pay for a replacement vehicle and presumably is reflected in

the settlement. If the Hawkins had instead been given the "actual cash value" for the car, the deduction would have reduced that figure accordingly. Schwenk acknowledged that he had deducted the $35 fee without actually inspecting the car or having any information as to its cleanliness.

Two of the claims adjusters, Mauritz and Paterno, testified that they were instructed to routinely deduct the $35 clean-up fee from the estimated value of total loss vehicles. There is no evidence, however, concerning the *number* of total loss claims each year or for any time period. In fact, the only suggestion of a number is from counsel for the Hawkins:

> Q. [by Mr. Thur] As a matter of fact, we could figure out mathematically. If Allstate has 100,000 total loss claims every year, and they take $35 off on each one of those, that amounts to $3,500,000; doesn't it?
>
> A. [by Mr. Schwenk] If you say so. I can't figure that far.

This evidence of Allstate's corporate policy, combined with the Hawkins' testimony regarding their dealings with Allstate, is sufficient to support a jury instruction on punitive damages. We do not believe, however, that there is any relationship between that evidence and a $3,500,000 punitive damage award. Where punitive damages are based on wrongful corporate policies which are profit oriented, the supporting evidence must go far beyond informed speculation. *Cf. Farr, supra.*

We find that the Hawkins met their burden of establishing a prima facie case for punitive damages; therefore, the trial court erred in granting Allstate's motion for judgement notwithstanding the verdict. We affirm the trial court's grant of Allstate's motion for a new trial on the basis that the amount of punitive damages award is not justified by the evidence.

We remand to the trial court for a new trial as to liability and both compensatory and punitive damages. The testimony of the first Allstate adjuster should be precluded unless it rises above mere character evidence.

/s/ ROBERT J. CORCORAN
ROBERT J. CORCORAN
Presiding Judge

CONCURRING:

/s/ JACK L. OGG
JACK L. OGG, Judge

Froeb, Judge Dissenting in Part, Concurring in Part

In my opinion, the trial court correctly granted judgment in favor of appellee Allstate notwithstanding the verdict and I would therefore affirm the judgment appealed. I concur with the portion of the decision which affirms the order granting the alternative motion for new trial.

/s/ DONALD F. FROEB
DONALD F. FROEB, Judge

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. C 432754

JACK RANDY HAWKINS, *et ux.*,

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, a foreign corporation, *et al.*,

Defendants.

JUDGMENT N.O.V. OR IN THE ALTERNATIVE ORDER FOR NEW TRIAL PURSUANT TO RULE 50(c)

(Assigned to Honorable David J. Perry, Division 16)

This cause came on regularly for trial on July 27, 1982. The plaintiffs and the defendant appeared through their attorneys, and a jury was regularly empanelled and sworn to try said cause. At the close of all the evidence the defendant moved the court for a directed verdict which the court denied. After returning to consider its verdict, the jury returned a verdict in favor of plaintiffs and against defendant in the amount of $15,000.00 for compensatory damages and 3.5 million dollars in punitive damages.

The defendant, thereafter, having timely moved the court to set aside the verdict and the judgment entered thereon, and to enter judgment notwithstanding the verdict on behalf of the defendant; and the court having considered the memoranda filed by the defendant in support of the Judgment N.O.V. and the memoranda filed by plaintiff in op-

position thereto; and the court having heard oral argument in open court;

And the court further making a determination that the evidence presented at trial was insufficient to justify the granting of a verdict in favor of plaintiffs;

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED pursuant to Rule 50(b) granting judgment notwithstanding the verdict in favor of the defendant and against the plaintiffs; and awarding the defendants their taxable costs incurred herein.

The defendant having moved the court for Judgment N.O.V. or in the alternative, new trial, and the court having granted the defendant's motion for Judgment N.O.V.; and the court having considered the memoranda of the defendant in support of the alternative motion for new trial and the memoranda of the plaintiffs filed in opposition thereto; and the court having considered oral argument of the parties offered in open court on the defendant's motion for new trial in the alternative;

And the court finding that the motion for new trial in the alternative pursuant to Rule 50(c) of the Arizona Rules of Civil Procedure should be granted for the following reasons:

1. The verdict in resulting judgment determining that the defendant committed a tort of bad faith is not justified by the evidence.

2. The verdict in resulting judgment imposing punitive damages on the defendant for the tort of bad faith is not justified by the evidence.

3. The verdict is the result of passion or prejudice.

4. The damages are excessive.

5. The court committed error in the admission of testimony by William Boettcher, Jan Mauritz and Pat Paterno.

6. There was error in instructing the jury on the nature of bad faith, the duty owed by the defendant to plaintiffs, and the extent of damages.

NOW, THEREFORE, pursuant to Rule 50(c) it is hereby ORDERED conditionally granting the defendant's motion for new trial, so that if this judgment is reversed on appeal the new trial shall proceed.

DATED this 1st day of October, 1982.

/s/ DAVID J. PERRY
DAVID J. PERRY
Judge of the Superior Court

COPY of the foregoing mailed/delivered this ___day of September, 1982, to:

Calvin C. Thur, Esq.
THUR & PRESTON
7007 East Indian School Road
Scottsdale, Arizona 85251
Attorneys for Plaintiffs

Supreme Court

STATE OF ARIZONA

251 West Wine STATE Capitol
1700 West Washington
Phoenix Arizona 14021 255-4534

Telephone (602) 255-4534

April 8, 1987

RE: JACK RANDY HAWKINS et ux vs. ALLSTATE INSURANCE CO et al
Supreme Court No. CV-86-0010-PR
Court of Appeals No. 1 CA-CIV 6881
Maricopa County No. C-432754

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 7, 1987, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration En Banc—DENIED.

Justices Cameron and Moeller recused themselves and did not participate in the determination of this matter.

DAVID R. COLE, Clerk

TO: Calvin C. Thur, Esq., Thur, Dawson & O'Sullivan, 7007 E. Indian School Road, Scottsdale, AZ 85251

Douglas L. Christian, Esq., and Mark I. Harrison, Esq., Harrison & Lerch, P.C., 1001 N. Central, Suite 900, Phoenix, AZ 85002

Hon. B. Michael-Dann, Presiding Judge, Maricopa County Superior Court, 201 W. Jefferson, Phoenix, AZ 85003

jeh

IN THE SUPREME COURT
FOR THE STATE OF ARIZONA

NO. CV-86-0010-PR

Court of Appeals
No. 1 CA-CIV 6881

Maricopa County
Superior Court
No. C-432754

JACK RANDY HAWKINS and CYNTHIA HAWKINS, husband and wife,

Plaintiffs-Appellants,

vs.

ALLSTATE INSURANCE COMPANY, a foreign corporation, et al.,

Defendant-Appellee.

MOTION FOR RECONSIDERATION EN BANC

The defendant-appellee, Allstate Insurance Company, through its counsel, Mark I. Harrison and Douglas L. Christian of Harrison & Lerch, P.C., moves this Court, pursuant to Rule 22, A.R.C.A.P., to reconsider *en banc* its decision issued and filed in this case on February 26, 1987.

DATED this 20th day of March, 1987.

HARRISON & LERCH, P.C.

By:/s/ MARK I. HARRISON
MARK I. HARRISON
DOUGLAS L. CHRISTIAN
1001 North Central Avenue

Suite 900
Phoenix, Arizona 85004
Attorneys for Defendant/Appellee

I. Introduction

The issues presented in this Motion for Reconsideration should be viewed in the context of three circumstances which must govern the Court's disposition of the Motion.

First, appellee came into this Court legally entitled to advance all available arguments in support of the Order entered by the trial court granting a new trial. *See cases cited infra* at 4.

Second, this Court decided, *sua sponte,* that *Linthicum v. Nationwide Life Insurance Co.,* 150 Ariz. 326, 723 P.2d 675 (1986) should not be applied "retrospectively" to the disposition of this appeal without affording appellee notice or the opportunity to present argument that *Linthicum must,* as a matter of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, be applied "retrospectively" to this case.

Third, appellee stands convicted of bad faith under a sentence of $3,500,000 in punitive damages on the basis of decision of this Court which post-date the underlying facts of this case and which created rules of substantive conduct of which appellee could not have been aware when the conduct occurred. This combination of circumstances has led this Court to reinstate a judgment which is violative of the Due Process Clause of the Fourteenth Amendment and all other rights incorporated by that Clause, including the Excessive Fines Clause of the Eighth Amendment.

II. The Posture of This Case Before This Court.

Appellee successfully argued to the trial court its entitlement to a new trial based upon five separate grounds. Thus, at that time the question whether appellee had raised

any federal constitutional objections to the jury's verdict was irrelevant because a new trial was to be conducted and all such objections could have been raised to any new verdict against appellee. Indeed, at most what can be said of appellee's failure to present to the trial court its federal constitutional challenges to the judgment is that appellee did not advance arguments which the trial court would not have decided in any event because of their gravity and the lack of necessity for the trail court to decide them. *State v. Yslas,* 139 Ariz. 60, 63, 676 P.2d 1118, 1121 (1984); *Hare v. Superior Court of the State of Arizona, in and for the County of Pima;* 133 Ariz. 540, 543, 652 P.2d 1387, 1390 (1982); *School District No. 26 (Bouse Elementary) of Yuma County v. Strohm,* 106 Ariz. 7, 9, 469 P.2d 826, 828 (1970); *County of Maricopa v. Anderson,* 81 Ariz. 339, 341, 306 P.2d 268, 269 (1957).

On appeal to the Court of Appeals, the same result obtains. If appellee had presented its federal constitutional objections to the jury's verdict there, that court would presumably not have decided those objections in light of its determination that the Order granting a new trial had to stand as a matter of state law. Furthermore, appellee was entitled in this Court to raise any and all available arguments in support of the trial court's Order so long as it did not seek to expand its rights under that Order. *Madisons Chevrolet, Inc. v. Donald,* 109 Ariz. 100, 505 P.2d 1039 (1973); *Talley v. Paradise Memorial Gardens, Inc.,* 107 Ariz. 585, 491 P.2d 439 (1971); *Santanello v. Cooper,* 106 Ariz. 262, 475 P.2d 246 (1970); *Maricopa County v. Corporation Commission of Arizona,* 79 Ariz. 307, 289 P.2d 183 (1955); *Rogers v. Mountain States Telephone & Telegraph Co.,* 100 Ariz. 154, 412 P.2d 272 (1966); *Merryweather v. Pendleton,* 90 Ariz. 219, 367 P.2d 251 (1961); *Arizona Public Service Company v. Mountain States Telephone and Telegraph Company, Inc.,* 149 Ariz. 239, 717 P.2d 918 (App. 1985); *Lake Havasu Resort, Inc. v. Commercial Loan Insurance Corporation,* 139 Ariz. 369, 678

P.2d 950 (App. 1983); *Stiles v. Industrial Commission,* 25 Ariz. App. 543, 545 P.2d 54 (1976); *City of Kingman v. Havatone,* 14 Ariz. App. 585, 485 P.2d 574 (1971); *Wagner v. Coronet Hotel, Inc.,* 10 Ariz. App. 296, 458 P.2d 390 (1969); *Aegerter v. Duncan,* 7 Ariz. App. 239, 437 P.2d 991 (1968). Appellee was and is entitled to raise on direct appeal and have decided its federal constitutional objections to the jury's verdict if this Court's decision is to reinstate that verdict.

In addition, appellee could not have anticipated that this Court would, inconsistently with the well-established presumption of retrospective application of its decisions, *see, e.g., Chevron Chemical Co. v. Superior Court,* 131 Ariz. 431, 435, 641 P.2d 1275, 1279 (1982), decide, *sua sponte* and without hearing any argument from appellee, not to apply retrospectively its decision in *Linthicum* to this case. This action by the Court is exacerbated becuase at the same time the Court did apply retrospectively its decision in *Rawlings v. Apodaca,* 151 Ariz. 149, 726 P.2d 565 (1986), in order to justify the admission of blatantly prejudicial testimony and thereby reverse the grant of appellee's motion for a new trial.

The *only* interest present in this case which even remotely justifies this Court's refusal to consider and decide appellee's federal objections to the jury's verdict is the interest of appellants in collecting the enormous windfall represented by the $3,500,000 punitive damage award. However, the State of Arizona has no interest in securing to litigants the collection of palpably unconstitutional judgments. Therefore, the decision of this Court must be reconsidered *en banc* and vacated and this case remanded to the trial court for additional proceedings.

III. The Failure of This Court To Apply Linthicum "Retrospectively" Violates Appellee's Rights Under the Due Process Clause of the Fourteenth Amendment.

In *Linthicum,* after argument on the petition for review which did *not* specifically raise the issue, this Court asked the parties to address the standard of proof required to justify an award of punitive damages. That suit had been brought in 1982 based upon conduct of the defendant insurer alleged to have occurred in the summer of 1980 at the earliest. On appeal to the Court of Appeals, the insurer successfully challenged the sufficiency of the evidence to sustain the award of punitive damages. This Court affirmed and, in doing so, announced that "the burden of proof for punitive damages is by clear and convincing evidenee." 150 Ariz. at 332, 723 P.2d at 681.

In the case at bar, appellee's conduct alleged to have been in bad faith occurred in December of 1979. The insufficiency of the evidence to sustain the punitive damage award was successfully urged in support of appellee's post-trial motions. Appellant subsequently brought this case to this Court. *In defense of the decision of the Court of Appeals,* under which appellee retained its right to a new trial, appellee advanced, *inter alia,* the argument that the Due Process Clause of the Fourteenth Amendment required proof by "clear and convincing" evidence in order to sustain the punitive damage award. This argument was not one which, if accepted by this Court, would have expanded appellee's rights under the decision of the Court of Appeals, because under that decision appellee was entitled to demand that the jury be instructed on the "clear and convincing" standard.[1]

Thus, and totally contrary to the result reached by this Court in declining to consider appellee's Due Process

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[1] As held by this Court in this case, *Linthicum* is to be applied to all trials held after September 15, 1986.

Clause challenge, appellee had an absolute *right* under this Court's precedents to raise and have decided its Due Process Clause , including its argument involving the standard of proof required in order to impose punitive damages. At the worst, appellee was situated no differently than the defendant in *Linthicum.* Indeed, the operative facts and trial of this case pre-dated the facts and trial in *Linthicum;* further, these cases were argued to this Court on the same day. Thus, it is somewhat facile to say that appellee's entitlement to the ruling in *Linthicum* required that decision to be applied "retrospectively." This Court's denial to appellee of the rule laid down in *Linthicum* is violative of the Fourteenth Amendment and necessitates a decision by this Court of appellee's Due Process Clause contentions.

This inexplicable departure from the Court's historic practice is not cured by its incorrect suggestion, slip op. at 32-33, that the question of *Linthicum's* retrospective application is one of policy having no federal constitutional dimension. Because punitive damages are imposed to fulfill the same purposes as are punishments administered in criminal proceedings—to punish and deter, retrospective application of any decision recognizing any of the federal constitutional rights asserted by appellee in its Supplemental Brief and again urged in this Motion for Reconsideration would be required under the Supreme Court's recent decision in *Griffith v. Kentucky,* 107 S. Ct. 708 (1987).[2]

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[2] In declining to reach appellee's federal constitutional challenges to the jury's verdict, the Court observed that it did so because, "This is not a case involving denial of a fundamental right in a criminal trial . . . ." Slip op. at 28. But appellee argued in its Supplemental Brief that it was and is constitutionally entitled to certain guarantees afforded by the Federal Constitution to criminal defendants before punitive damages may be imposed, which include the right to various procedural protections as well as the right to be free from the imposition of excessive fines. If appellee's federal constitutional challenges are well taken, then this case does involve the same consideration that this

In *Griffith,* the Supreme Court squarely rejected the proposition, implicit in the opinion of this Court in the case at bar, that a decision which implicates federal constitutional rights of citizens who are subjected to criminal punishments and which constitutes a "clean break" with precedent need not be applied retrospectively. This Court cannot avoid the *Griffith* rule simply by adopting the "clear and convincing" standard as a matter of state policy. If the Court's decision in *Lithicum* is constitutionally compelled, that decision must be extended to this case.

The failure of this Court to apply *Linthicum* retrospectively is especially troubling because, as discussed *infra,* the Supreme Court has recently set for argument the question whether excessive punitive damage awards are subject to the constraints of, *inter alia,* the Due Process Clause *ex proprio vigore* and as that clause incorporates the Eighth Amentment. Under *Griffith,* appellee would be entitled to the retrospective application of any such constitutional rule in this case.

IV. Additional Developments in the Law Require Reconsideration of Issues in This Case.

This Court has reimposed on appellee a verdict which can only be sustained on the basis of new rules formulated by the Court since the verdict was entered and well after the conduct at issue occurred. If appellee must be subject to those new rules, then the Due Process Clause of the Fourteenth Amendment requires that appellants also be made subject to relevant new rules. On March 9, 1987, the Supreme Court of the United States noted probable jurisdiction in *Bankers Life and Casualty Co. v. Crenshaw,* No. 85-1765. That case raises the issues not reached by the Supreme Court in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580 (1986). As appellee has argued above, it would be entitled to have any ruling favorable to the ap-

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Court's language quoted above implicitly assumes would have required decision of the constitutional issues raised by appellee.

pellant in *Crenshaw* applied to it under the Supreme Court's decision in *Griffith v. Kentucky*.

V. The Court's Idiosyncratic Treatment of the Issues in This Case Violates Appellee's Constitutional Rights And Is Fundamentally Unfair.

This Motion has focused thus far on the constitutional implications of this Court's decision. It serves to point out that the Court's decision is grounded in an inexplicable series of anomalies by which the Court works a grave injustice on appellee:

1. The prospective-only application of the "clear and convincing" burden of proof in punitive damages cases enunciated in *Linthicum* is contrary to this Court's established rules.[3]

2. The retrospective application of this Court's "evil mind" formulation for punitive damages in *Rawlings* and *Linthicum* to justify a new and expanded application of Rules 403 and 404(b), Rules of Evidence.[4]

3. The failure in this case to adhere to the Court's requirement in *Linthicum, Rawlings, Gurule v. Illinois Mutual Life and Casualty Co.*, No. CV-86-0488-PR (Ariz. Mar. 2, 1987) and *Filasky v. Preferred Mutual Insurance Co.*,

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[3] Compare the principle of presumptive retroactivity clearly enunciated by this Court in *Brannigan v. Raybuck*, 136 Ariz. 513, 520, 667 P.2d 213, 220 (1983) and *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 435, 641 P.2d 1275, 1279 (1982) with the constitutionally untenable basis for avoiding retroactivity provided by the Court in the present case. Slip. op. at 32-33.

[4] The necessity for evidence of an "evil mind" as an essential pred-

No. CV-86-0237-T (Ariz. Mar. 2, 1987), that punitive damages can be awarded only when the defendant "intended to injure the plaintiff or consciously pursued a course of conduct knowing that it created a *substantial risk of significant harm to the insured.*"[5]

4. A decision sustaining a constitutionally excessive punitive damage award based on a fictional factual predicate—a $35 "clean-up" charge which was not applied in computing the amount paid to the insured for the replacement vehicle which he selected.[6]

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icate for punitive damages was first articulated by this Court in *Linthicum*, 723 P.2d at 680 and in *Rawlings*, 726 P.2d at 578-79. *Linthicum* and *Rawlings* were both decided months after the present case was briefed and argued and years after the conduct of the appellee at issue in this case. Yet, in its opinion, this Court relies heavily on *Rawlings* in expanding the scope of Rules 403 and 404(b) to justify the admission of blatantly prejudicial and irrelevant testimony. Slip op. at 11-18.

[5] In *Linthicum*, *Rawlings*, *Gurule v. Illinois Mutual Life & Casualty Co.*, and *Filasky v. Preferred Risk Mutual Insurance Co.*, this Court repeatedly prescribed, as an essential requirement for punitive damages, the need to prove that the defendant knew "that its conduct was likely to cause unjustified, *significant damage to the insured.*" (Emphasis added.) *Linthicum supra*, at 680; *Rawlings, supra*, at 578, *Gurule*, slip. op. at 5; *Filasky*, slip op. at 12. The same principle was rhetorically stated in the present case, slip op. at 12, but was ignored by the Court on a record which showed that even if appellants' testimony were entirely accepted as true, appellants' maximum "damage" or "harm" was *de minimis*.

[6] Without attempting to critically comment on the Court's analysis and evaluation of the evidence referred to in the opinion, it is apparent that the Court, like the jury, was confused or misled about the appellee's conduct *vis-a-vis* these appellants. At oral argument it was apparent that at least one member of the Court was convinced that certain deductions had reduced the amount paid to appellants and refused to permit appellee's counsel to correct a misconception which has now been perpetuated in the Court's opinion. In fact, there was no deduction for tire wear and although the infamous "clean-up" fee ap-

5. A decision which characterizes appellee's conduct in resolving a dispute over a property damage loss involving, at most, a few hundred dollars, as "hardball tactics" and "chiseling" to justify reinstatement of an excessive punitive damage award while approving the conduct of the insurer in *Linthicum* as a "tough claims policy," or in *Gurule* as "self-interested".[7]

6. Imposing a punitive damage award on appellee 175 times greater than the maximum fine which could have been imposed on appellee if it had been convicted of a felony under Arizona's roughly analagous criminal statute pun-

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pears on the appellee's "evaluation form," it was not a part of the computation which resulted in the amount actually paid to the appellants. (*See, e.g.*, R.T. Vol. 2, pp. 105-107; Vol. 3, p.57.) Counsel for appellants essentially conceded this point at oral argument in the Court of Appeals. Without a solid showing of wrongful conduct causing "significant damage" *to appellants* as a predicate, there is really no basis for admission of the general, imprecise evidence ostensibly offered (and admitted by this Court) to show that the conduct in this case was the logical extension of a "pattern" of similar misconduct.

[7] ". . . to say that shaping the opinion to the result is hard to avoid, and that it has been done by the best, is only to emphasize the difficulties involved and the importance of constant effort to see that decisions are really reached, as far as humanly possible, on intellectually valid and disinterested grounds." Aldisert, R.J. *The Judicial Process* 441-42 (West Pub. Co. 1976) (quoting Judge Henry J. Friendly and Dean Erwin N. Griswold). In the present case, the Court includes the inflammatory rhetoric used by appellants' *counsel* to describe the appellee's conduct and, more disturbing, to justify the reinstatement of a huge punitive damage award. Yet, in rejecting punitive damages in *Linthicum* and *Gurule*, the Court minimized the conduct of the insurers and approved a carrier's construing "its policy strictly in its own favor," its "tough claims policy" (*Linthicum*, *supra*, at 682) and considering "its own interests in denying (the insured's) claim." (*Gurule*, slip op. at 20). Appellee faces the prospect of a multi-million dollar punitive damage award for doing no more than considering its own interests and pursuing a tough claims policy.

ishing the commission of a deceptive business practice, A.R.S. § 13-2202. The Court reached this unconstitutional result without even requiring the *en banc* participation of all members of this Court or even the four Justices who were qualified under the Arizona Constitution to decide this case.[8]

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[8] When Judge Bruce Meyerson was first assigned to serve on the Supreme Court for the disposition of this case, he was a sitting Judge on the Arizona Court of Appeals, Division One (see Order dated April 30, 1986, signed by then Vice Chief Justice Frank X. Gordon, Jr.). On December 1, 1986, Judge Meyerson resigned from the bench. On December 5, 1986, despite his status as a private citizen, Mr. Meyerson was appointed as a Judge *pro tempore* on the Court of Appeals for the purpose of continuing participation in the determination of this case (see Order dated December 5, 1986, signed by then Chief Justice William A. Holohan and Order dated February 26, 1987, signed by Chief Justice Frank X. Gordon, Jr.).

Article VI, §3 of the Arizona Constitution was cited as authority for the *pro tempore* appointment in the December 5, 1986 Order. However, that constitutional provision provides only for assignment of "Judges" to serve in other courts and does not address the appointment of judges *pro tempore*. Constitutional authority for the appointment of judges *pro tempore* is found in Article VI, §31 of the Constitution which appears to provide for "the appointment of members of the Bar . . . as judges *pro tempore* of courts *inferior to the Supreme Court*." (Emphasis supplied.) Nothing in the section appears to authorize the appointment of *private citizens* to the Arizona Supreme Court. A.R.S. §12-147(d), confers upon judges *pro tempore* only those powers of a judge of the Court of Appeals and does not purport to grant authority to *pro tempore* judges to sit on the Arizona Supreme Court.

The composition of the court was even more mysterious by the time this decision was filed. Although the opinion states that Justice Jack D. H. Hays "participated in the determination of this matter," he neither expressly concurred with either the majority opinion or the dissenting opinion. Appellee cannot discern any rules promulgated by this Court providing for reconsideration of this case by "division" and, therefore, requests that this motion for reconsideration be considered *en banc* by the current, qualified members of the Court and by retired Justice Hays, whose participation is specifically authorized by Article

7. The failure to decide this case with an understanding and application of the well-established rules which enable appellee to advance any argument or theory which supports the order appealed from so long as those arguments do not expand appellee's rights under that judgment.[9]

8. This Court acknowledged that appellee's relevancy objection at trial to the admission of the Boettcher testimony implicitly included, under a prior decision of this Court, *Jones v. Pak Mor, Mfg. Co.*, 145 Ariz. 121, 125, 700 P.2d 819, 823 (1985), an objection based upon "unfair prejudice," but the Court nonetheless ignored its decision in *Jones* and consequently refused to apply the well established rule allowing the trial judge to grant a new trial for errors in the admission of evidence, ostensibly because this Court perceived no "legal" error in the admission of the testimony.[10]

6, §20 of the Arizona Constitution. The Due Process Clause of the Fourteenth Amendment requires as much. *Cf. Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986).

[9] The Court based its decision to finesse the constitutional issues presented by appellee on the mistaken belief that ". . . consideration of a constitutional issue raised for the first time on appeal is discretionary . . .," slip op. at 28. The Court's failure to decide the constitutional issues on their merits appears, at least by implication, to stem from the erroneous assumption that appellee was obligated to satisfy certain requirements regarding the identification of issues which are normally associated only with *appellants*. See A.R.C.A.P. Rules 13(a)(5) and 23(c)(2). As discussed in this motion, the law in Arizona and elsewhere confirms appellee's entitlement to raise any and all available arguments *in support of* the orders of the trial court and Court of Appeals at any stage of appellate review, so long as those arguments do not expand appellee's rights under those orders and judgments.

[10] *See Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978).

The Court's grant of review in this case is as puzzling as its decision is unjust. Review was granted ostensibly "to determine the admissibility of an insurer's past claims practices and policies and to examine the quantum of proof necessary to sustain an award of punitive damages." Slip op. at 2. The exercise of discretionary jurisdiction by the Court to review the "quantum of proof" issue is puzzling because the Court accepted review in *Gurule* for the same express purpose shortly after the Court heard argument in this case. The grant of review on the evidentiary question is equally mystifying in view of the way in which the Court was forced to manipulate its own precedents in order to justify its ultimate decision.

This apparently indiscreet exercise of discretionary jurisdiction would not be remarkable if appellee's constitutional rights were not directly implicated and violated by the Court's disposition of the issues before it. Under the circumstances, discretion was not the better part of valor and fundamental fairness and due regard for appellee's constitutional rights require *en banc* reconsideration of the Court's decision.

RESPECTFULLY SUBMITTED this 20th day of March, 1987.

HARRISON & LERCH, P.C.

By: /s/ MARK I. HARRISON
MARK I. HARRISON
DOUGLAS L. CHRISTIAN
1001 North Central Avenue
Suite 900
Phoenix, Arizona 85004
Attorneys for
Defendant-Appellee

Certificate of Service

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, a notary public in and for the County of Maricopa, State of Arizona, hereby states that under the direct supervision of Mark I. Harrison, attorney for defendant/appellee, she caused to be hand-delivered to Marc Thur, for Calvin C. Thur, Esq., THUR, DAWSON & O'SULLIVAN, attorneys for plaintiffs/appellants, appellee's Motion for Reconsideration En Banc this 20th day of March, 1987; and

A Copy of Appellee's Motion for Reconsideration En Banc was also mailed, postage prepaid, to Calvin C. Thur, Esq., THUR, DAWSON & O'SULLIVAN, attorneys for defendants/appellants, this 20th day of March, 1987.

TERRI SHROYER
TERRI SHROYER

My Commission Expires:
May 15, 1987.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

No. 1 CA-CIV 6881

MARICOPA County Superior Court No. C-432754

PETITION FOR REVIEW

JACK RANDY HAWKINS and CYNTHIA HAWKINS, husband and wife,

Plaintiffs-Appellants,

vs.

ALLSTATE INSURANCE COMPANY, a foreign corporation, et al.,

Defendant-Appellee.

Appellants petition the Supreme Court of Arizona to review the decision of the Court of Appeals in this matter. Appellant's Motion for Reconsideration in the Court of Appeals was denied on December 2, 1985. (Appendices 1 and 2.)

* * * * *

B. ISSUES PRESENTED FOR REVIEW.

1. Should Arizona recognize the duration of misconduct as a factor to consider on the issue of punitive damages, particularly when the uncontradicted evidence shows a systematic and profitable scheme of oppressive conduct by an insurance company against it insureds?

2. When an insurer admits to making automatic deductions, but claims its motive is "avoiding overpayment" as opposed to "chiseling on claims"—is evidence of the defendant's past motive admissible on the issues of bad faith and/or punitive damages?

3. Can a jury's assessment of punitive damages amounting to $3^1/_2$ days net income of the defendant and based upon evidence of a systematic and profitable scheme of misconduct affecting many people, be upheld without proof of the specific amount of illicit profit generated by the defendant's misconduct?

4. When plaintiff exposes a nefarious scheme by defendant to cheat millions of people, should plaintiff's performance of a public service be recognized as an additional factor in determining whether a punitive award is excessive, and should judicial restraint be exercised in setting aside a jury's award under such circumstances?

* * * * *

D. REASONS FOR GRANTING THIS PETITION.

The Court should grant this Petition because:

1. No Arizona decision specifically indicates whether or not duration of misconduct is a factor that can be considered in assessing punitive damages.

2. A rule of evidence promulgated by the Supreme Court is being misconstrued or misapplied.

3. Important legal issues have been incorrectly decided.

4. There is no controlling Arizona decision as to whether the specific amount of illicit profit from a systematic scheme of misconduct must be proved in order to support the amount of a punitive damage verdict.

5. The case concerns important questions of law that should be settled for the future for other cases.

I. DURATION OF MISCONDUCT AND MOTIVE WAS RELEVANT.

The Court of Appeals held Mr. Boettcher's testimony about Allstate's past instructions and teachings on claims practices was irrelevant. The Court quotes a few lines of testimony at page 7 of the Slip Opinion, but that was the

most general portion of his testimony and no objection was made. The specific and primary portion of Mr. Boettcher's testimony is quoted at 11-12 of this petition. Such evidence is relevant and this Court should clarify such admissibility for the following reasons:

(a) Duration Of Misconduct Should Be A Factor For Consideration On The Issue Of Punitive Damages, Both As To Liability And Amount.

The testimony by Mr. Boettcher was relevant to the issue of punitive damages for many reasons. Combined with the testimony of Pat Paterno, it demonstrated that Allstate had been carrying on its practice of shaving payments on its claims for at least 18 years. Pat Paterno's testimony indicated Allstate was still instructing its adjusters to take something off the amount of every claim during the time that the Hawkins' claim was being handled. The duration of wrongful conduct is a factor the jury can consider when assessing punitive damages. *Wagen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1981); *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551, (1969); *State ex rel. Young v. Crookham*, 290 Ore. 61, P.2d 1268, 1274 (1980).

(b) Past Unethical Practices Are Relevant to Both The Bad Faith And Punitive Damage Issues.

Evidence of past unethical practices is relevant on the issue of punitive damages. *Dunlap v. Jimmy G.M.C.*, 136 Ariz. 338, 666 P.2d 83 (App.1983).

The California Court in *Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984), admitted evidence of fraudulent claims practices potentially affecting numerous insureds other than the plaintiff. Based on that evidence, the 2.5 Million Dollar punitive award was upheld against a small insurance company, with the Court stating:

> "We will not assume the jury's award of punitive damages was intended to punish defendant simply for its conduct toward plaintiff. In pat, the jury's award of punitive damages obviously punished defendant for having engaged in a practice 'firmly grounded in established company policy' (citation omitted) that had the potential of defrauding countless insureds other than plaintiff." (150 Cal.App.3d at 637.)

The Court of Appeals recognized the *Moore* decision but said that *Moore* required the antecedent practice to be substantially similar. It is submitted that the practices and instructions testified to by Boettcher were substantially similar to the practices Allstate used on Jack and Cindy Hawkins.

With a continuing plan or scheme, the question of time or similarity goes to the weight, not the admissibility. 2 *Weinstein's Evidence*, (1980), ¶ 404[16] states:

> ". . . Courts use the plan or design label in a variety of somewhat overlapping situations:
>
> "(1) *Same or common or connected or inseparable plan or scheme or transaction, or res gestae.* McCormick states that evidence is introduced for this purpose '[t]o complete the story. . . . [*Id.* at 404-85.]
>
> "(2) *Continuing plan, scheme or conspiracy.* The object of such evidence is 'to prove the existence of a definite project directed toward completion of the [act] in question.' The cases reveal a continuum ranging from situations close to the common design, to cases where the boundaries of the scheme are astonishingly wider." [*Id.* 404-89.]

See, also, State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983), *cert. den.*, 104 S.Ct. 199 [remoteness of time, goes to weight.]

(c) Plaintiff Should Not Be Precluded From Showing Defendant's Motive, Malicious Or Oppressive Intent And Existence Of A Continuing Scheme As Those Factors Apply To The Issue of Punitive Damages.

The Court of Appeals held that the exception set forth in Evidence Rule 404(b) did not apply to the admissibility of Mr. Boettcher's testimony because "Allstate does not deny its acts nor does it claim that they were unintentional."

The jury must determine what punitive damages, if any, to award based on the proper premise of punishment and of deterring future similar misconduct. Any evidence which shows, or from which the jury can infer the defendant's specific motive or the malicious or oppressive nature of the intended act is therefore relevant. The attitude and conduct of the wrongdoer, and its continued misconduct with such state of mind is also relevant. *Weinstein's Evidence, supra*, explains intent and motive as:

> ". . . [I]ntent has been defined 'as that state of mind which negatives accident, inadvertence or casualty.' Consequently, evidence of another [act] which tends to undermine defendant's innocent explanation for his act will be admitted; 'the oftener a like act has been done, the less probable it is that it could have been done innocently.' Repetition affords an 'opportunity for reflection and for foresight of the consequences,' so that even if defendant did not possess the requisite intent initially, it may be inferred that after being involved in a number of incidents, he must have arrived at a mental state inconsistent with innocence by the time of the charged act. . . ." *Id.*, ¶ 404[12] at 404-84, 67.

See also, State ex rel. Young v. Crookham, supra, at 1274.

II. A JURY'S ASSESSMENT OF PUNITIVE DAMAGES AMOUNTING TO 3-1/2 DAYS NET INCOME OF A DEFENDANT AND BASED UPON EVIDENCE OF A SYSTEMATIC AND PROFITABLE SCHEME OF MISCONDUCT AFFECTING NUMEROUS PEOPLE, NEED NOT BE SUPPORTED BY PROOF OF THE SPECIFIC AMOUNT OF ILLICIT PROFIT GENERATED BY DEFENDANT'S MISCONDUCT.

While it is true that profitability of a defendant's wrongful conduct is a factor which a jury can consider on the issue of punitive damages, a plaintiff need not produce evidence of a total amount of illicit profits in order to support an assessment of punitive damages when the punitive damages amount to only 3-$^1/_2$ days of the defendant's net earnings.

Allstate's net worth was shown to be Two Billion Three Hundred Thirty-Three Million Dollars ($2,333,000,000); and its net income to be approximately One Million Dollars ($1,000,000) per day. The punitive damages assessment of only 3-$^1/_2$ days net income is extremely small for a corporation the size of Allstate.

The Court of Appeals concluded that the punitive damages were excessive because there was no proof of the specific amount of illicit profit made by Allstate from its improper deductions. Punitive damage assessments do not require such evidence.In *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984), there was a Three Million Dollar punitive damage aware. In that case there was no evidence of the amount of illicit profits made by Allstate from their wrongful claims practices. Similarly, in *Moore v. American United Life Ins. Co, supra*, a 2.5 Million Dollar punitive damage award was upheld without evidence of the amount of profits from the defendant's wrongful practices. In *Moore*, the Court admitted evidence of only one other claim that was mishandled.

In *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir. 1982), the Court found a $2,500 compensatory award and $375,000 punitive award was not excessive where there was "a corporate decision by Allstate not to inform its policyholders of undisclosed coverage required by Mississippi law," and such nondisclosure might have affected the claims presented by some other policyholders. There was no evidence of the number of policyholders possibly affected or of the illicit profit to Allstate.

The specific amount of profitability from wrongful conduct is not necessary as a prerequisite to a punitive damage award. This Court should clarify that rule, because this issue will arise in future cases.

III. PLAINTIFFS' PUBLIC SERVICE IN EXPOSING A NEFARIOUS SCHEME AFFECTING A LARGE NUMBER OF PEOPLE SHOULD BE A FACTOR CONSIDERED ON THE AMOUNT OF PUNITIVE DAMAGES AND JUDICIAL RESTRAINT SHOULD BE EXERCISED IN SETTING ASIDE A JURY'S AWARD UNDER SUCH CIRCUMSTANCES.

Some courts have recognized that bringing a defendant to justice is a factor to consider when the conduct has affected many people. *Moore v. American United Life Ins. Co., supra.* In *Richards v. Allstate Ins. Co., supra,* the Court held:

> "An additional consideration in determining whether a punitive award is excessive is whether the plaintiff has performed a public service by bringing the wrongdoer to account."

Respectfully submitted: December 17, 1985.

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No. 87-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLSTATE INSURANCE CO.,
Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. THE ARIZONA SUPREME COURT DID NOT CONSIDER ANY OF THE CONSTITUTIONAL QUESTIONS PETITIONER SEEKS TO RAISE HERE, BECAUSE PETITIONER WAIVED SOME QUESTIONS AND FAILED TO RAISE OTHERS IN A TIMELY MANNER, AS REQUIRED BY CONSISTENTLY APPLIED STATE PRACTICE	10
A. Petitioner's Eighth Amendment Argument Was Explicitly Waived In The Arizona Supreme Court	11
B. Petitioner's Due Process Claims Were Not Raised Below In A Timely Manner	12
C. Even If Petitioner's Due Process Challenges to the Preponderance Of The Evidence Standard and To The Jury's Consideration Of The "Duration" Of Petitioner's Misconduct Had Been Timely, The Arizona Supreme Court Would Not Have Considered Those Challenges Because Petitioner Failed to Object to Jury Instructions That Were Directly Inconsistent With Those Challenges	15
II. EVEN IF PETITIONER HAD PROPERLY RAISED ITS CONSTITUTIONAL CLAIMS BELOW, IT WOULD BE INAPPROPRIATE TO GRANT CERTIORARI	17
A. Petitioner's Claim That the Punitive Damage Award Was Excessive Under the Constitution Does Not Warrant Discretionary Review	18

TABLE OF CONTENTS—Continued

Page

1. Petitioner's Eighth Amendment Argument 18

2. Petitioner's Due Process Arguments 19

B. Petitioner's Claim That Punitive Damages Can Only Be Imposed If Every Constitutional Safeguard Available in Criminal Trials Has Been Provided Does Not Warrant Discretionary Review 21

C. Petitioner's Claim That Even In Civil Cases The Due Process Clause Requires "Clear and Convincing Evidence" Before Punitive Damages Can Be Imposed Does Not Warrant Discretionary Review 26

D. Petitioner's Claim That The Due Process Clause Requires That Common Law Rules Restricting the Imposition of Punitive Damages Be Applied To All *Civil* Cases Pending on Appeal Does Not Warrant Discretionary Review 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Acheson v. Shafter, 107 Ariz. 576, 490 P.2d 832 (1971) 20
Addington v. State of Texas, 441 US 418 (1979) 27
Aetna Life Insurance Co. v. Lavoie, 475 US 813 (1986) 8, 9, 11
Ahmed v. Collins, 23 Ariz. App. 54, 530 P.2d 900 (1975) 17
Andrew Brown Co. v. Painters Warehouse, Inc., 111 Ariz. 404, 531 P.2d 527 (1975) 16
Arizona Public Service Co. v. Mountain States Telephone and Telegraph Co., 149 Ariz. 239, 717 P.2d 246 (1970) 15
Bailey v. Anderson, 326 US 203 (1945) 12
Ballew v. Georgia, 435 US 223 (1978) 26
Bankers Life and Casualty Co. v. Crenshaw, Sup. Ct. No. 85-1765 ..... *passim*
Barr v. Columbia, 378 US 146 (1964) 13
Barrio v. San Manuel Division Hospital, 143 Ariz. 101, 692 P.2d 280 (1984) 14
Brotherton v. Celotex Corp., 202 N.J. Super. 148, 493 A.2d 1337 (1985) 22
Brown v. Louisiana, 447 US 323 (1980) 24
California Bankers Ass'n v. Shultz, 416 US 21 (1974) 24
Cardinale v. Louisiana, 394 US 437 (1969) 11
Chevron Oil Co. v. Huson, 404 US 97 (1971) 29, 30
Daugherty v. Firestone Tire & Rubber Co., 85 F.R.D. 693 (N.D. Ga. 1980) 18
Defnet and Investment Co. v. State, 103 Ariz. 388, 442 P.2d 835 (1968) 14
District of Columbia Court of Appeals v. Feldman, 460 US 462 (1983) 12
Downey Savings and Loan Ass'n v. Ohio Casualty Insurance Co., 234 Cal. Rptr. 835 (Cal. App. 1987) 18, 22
Exxon Corp. v. Eagerton, 462 US 176 (1983) 12
Filasky v. Preferred Risk Mutual Ins. Co., 735 P.2d 76 (Ariz. 1987) 21

TABLE OF AUTHORITIES—Continued

	Page
First National Bank of Boston v. Bellotti, 435 US 765 (1977)	24
Flieger v. Reed, 120 Ariz. 31, 583 P.2d 1351 (1978)	20
Gibson v. Gibson, 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971)	22
Godchaux Co. v. Estopinal, 251 US 179 (1919)	12
Grant v. Arizona Public Service Co., 133 Ariz. 434, 652 P.2d 507 (1982)	17
Griffith v. Kentucky, 93 L.Ed.2d 649 (1987)	29
Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)	22
Gurule v. Illinois Mutual Life & Cas. Co., 735 P.2d 85 (Ariz. 1987)	21
Hansen v. Johns-Manville Products Corporation, 734 F.2d 103 (5th Cir. 1984), *cert. denied*, 470 US 1051 (1985)	22
Hart-Anderson v. Hauck, Civ. No. 85-498 (Mont. March 17, 1987)	18
Hawkins v. Allstate Insurance Company, 733 P.2d 1073 (Ariz. 1987)	*passim*
Ingraham v. Wright, 430 US 651 (1977)	18, 19
Johnson v. New Jersey, 384 US 719 (1966)	24
Judy's Foods, Inc. v. A & B Food Services Corp., 107 S. Ct. 460 (1986)	9, 14
Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission, 85 Pa. Comm. 1, 480 A.2d 1317 (1984)	24
Layne & Bowler Corp. v. Western Well Works, Inc., 261 US 387 (1923)	27
Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986)	*passim*
Maricopa County v. Corporation Commission, 79 Ariz. 307, 289 P.2d 183 (1955)	15
McCray v. New York, 461 US 961 (1983)	28
McDermott v. Kansas Public Service Co., 238 Kan. 462, 712 P.2d 1199 (1986)	22
McGoldrick v. Compagnie Generale, 309 US 430 (1940)	12

TABLE OF AUTHORITIES—Continued

	Page
Palmer v. A.H. Robins, 684 P.2d 187 (Colo. 1984) (en banc)	18
People v. Superior Court, 115 Cal. Rptr. 812 (Supr. Ct. 1974)	23
Peterson v. Superior Court, 181 Cal. Rptr. 784, 642 P.2d 1305 (Supr. Ct. 1982)	22
Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986)	21
Rice v. Sioux City Memorial Park Cemetery, 349 US 70 (1954)	27
Rubi v. Transamerica Title Ins. Co., 131 Ariz. 403, 641 P.2d 891 (1982)	20
Ruth v. Industrial Commission, 107 Ariz. 572, 490 P.2d 828 (1971)	14
Santanello v. Cooper, 106 Ariz. 262, 475 P.2d 249 (1970)	15
Santosky v. Kramer, 455 US 745 (1982)	27
Sedima, S.P.R.L. v. Imrex Co., 473 US 479 (1985)	23
Silkwood v. Kerr-McGee Corp., 464 US 238 (1984)	25
Southern Pacific Transportation Co. v. Lueck, 111 Ariz. 560, 535 P.2d 599 (1975)	17
Sparks v. Republic National Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982), *cert. denied*, 459 US 1070 (1982)	17
Street v. New York, 394 US 576 (1969)	12
Sullivan v. Little Hunting Park, 396 US 229 (1969)	13
Tacon v. Arizona, 410 US 351 (1973)	12
Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398 (Ct. App. 1967)	23
Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 84 P.2d 581 (1938)	13, 14
Unified School District No. 490 v. Celotex Corporation, 6 Kan. App. 2d 346, 629 P.2d 196 (1981)	18, 22
United States v. Ward, 448 US 242 (1980)	23
Webb v. Webb, 451 US 493 (1981)	12
Whitney v. California, 274 US 357 (1927)	12

TABLE OF AUTHORITIES—Continued

	Page
Williams v. Florida, 399 US 78 (1970)	26
Wilson v. Cook, 327 US 474 (1946)	12
Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132 (1976)	19
STATE CONSTITUTIONAL PROVISIONS:	
Arizona Constitution, Art. 2, § 31	26
Arizona Constitution, Art. 18, § 6	26
STATUTES, RULES AND REGULATIONS:	
Arizona Rule of Civil Procedure 51(a)	16
MISCELLANEOUS:	
Criminal Safeguards and the Punitive Damages Defendant, 34 U. CHI. L. REV. 408 (1967)	24
THE ECONOMIST, Aug. 1, 1987	9
RESTATEMENT (SECOND) OF TORTS § 908 (1979)	20
Stern, Gressman & Shapiro, SUPREME COURT PRACTICE 181 (6th ed. 1986)	13

STATEMENT OF THE CASE

By presenting the "relevant" facts in a selective and misleading manner, petitioner Allstate Insurance Company implies that this case involves little more than an insurer's $200 underpayment of an insurance claim arising out of the "total loss" of an insured automobile, for which the insurer was subjected to a $3.5 million punitive damage award. A more complete and accurate presentation of the record reveals that the underpayment to respondents Jack and Cynthia Hawkins was substantially greater and was not an isolated event. Instead, that underpayment was the result of a conscious and longstanding corporate policy to profit Allstate millions of dollars by deliberately underpaying *all* such claims. Pursuant to that policy, petitioner repeatedly engaged in a broad range of malicious actions, all in a conscious effort to coerce respondents to accept less than the fair market value of their automobile.

It is undisputed that the policy required petitioner to pay "the actual cash value" of the destroyed automobile, that actual cash value meant the automobile's "fair market value just prior to destruction," and that the jury was so instructed, without objection. Trial Transcript (hereafter, "Tr."), vol. 6, p. 5. *See also id.*, vol. 5, pp. 15-18, and the Appendix to Petition For Review to the Arizona Court of Appeals (hereafter, "Ariz. Rev. App."), No. 5 at 9. It is also undisputed that the policy obligated petitioner "to deal fairly in handling a claim made by its insured under the policy, and . . . to make *full payment* of promised benefits to its insured," and the jury was so instructed, without objection. Tr., vol. 6, p. 6 (emphasis added).

Despite these obligations, the evidence at trial established that petitioner refused to make full payment of fair market value, and that its refusal was consistent with and required by petitioner's longstanding corporate policy of "chiseling" its insureds. Testimony of Jan Mauritz, Esq., a former Senior Claims Representative

for petitioner. Tr., vol. 4A, p. 38, Ariz. Rev. App., No. 13 at 38. This policy was designed to reduce the payments petitioner would have to make on legitimate claims by amounts that were relatively small in individual cases, but very substantial in the aggregate, so that all payments would be "substantially below fair value." *Id.*

The jury, the Court of Appeals, and the Arizona Supreme Court all concluded that the evidence justified an award of punitive damages. Those factual findings are not at issue here, so respondents will note only some of the evidence that supported the award:

Petitioner's claims adjuster determined, using the "Blue Book" retail value, that the fair market value of respondents' car immediately before the accident was $6,545. Ariz. Rev. App., No. 7. In making this determination, however, the adjuster ignored many features and options of the insured car (such as power windows, undercoating, etc.) that would have increased its Blue Book value. *Id.*; *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1076 (Ariz. 1987); Appendix to Petition for Writ of Certiorari ("Pet. App.") 3a. The adjuster admitted at trial that the value of those options and features should have been added to his determination of Blue Book value, and that the resulting fair market value, per the Blue Book, would have been at least $7,300. Ariz. Rev. App., No. 10 at 37; Tr., vol. 3, p. 37.

Blue Book valuations already take into consideration "the car's condition immediately prior to the loss." 733 P.2d at 1076; Pet. App. 3a. Blue Book valuations "include deductions for the condition of the exterior of the car, paint, bumpers, upholstery, glass, tires and clean up," if those deductions are "needed to bring the car to average retail condition." 733 P.2d at 1076; Pet. App. 3a. Nevertheless, after supposedly determining the Blue Book value of respondents' car, considering its condition and cleanliness, petitioner's claims adjuster further reduced that value by automatically deducting a $35 "clean-up fee" from the Blue Book estimate. Ariz. Rev.

App., No. 7. He did so even though he had indicated on the Blue Book appraisal form that the "condition" of the car was "ok" in every respect, including cleanliness. *Id.*

The adjuster then obtained, by telephone, dealer estimates, ranging from $6,150 to $6,300, of the value of allegedly "similar" cars. These estimates were based on the adjuster's knowingly incomplete description of the insured car to those dealers, in which he failed to mention many of the insured car's more valuable features and options. 733 P.2d at 1076; Pet. App. 3a. Based on these dealer estimates, petitioner's adjuster estimated the value of respondents' car at $6,200 and, again, automatically deducted a $35 cleaning fee from that "market" estimate. 733 P.2d at 1076; Pet. App. 3a-4a.

The adjuster then selected four allegedly "similar" cars and instructed respondents to see if one of them would be a satisfactory replacement. However, when respondents chose one of the cars selected by the adjuster, he "would not let [respondents] have the car they selected," even though it was one of the four cars he had selected as "similar" to their destroyed car. 733 P.2d at 1076; Pet. App. 4a. The adjuster claimed that car was not comparable to respondents' car because respondents' car allegedly had "excessive mileage." Tr., vol. 1, p. 41. Ariz. Rev. App., No. 8 at 41. In fact, in his first conversation with respondents the adjuster had said "he would have to deduct approximately [$]300 off" the average retail value of respondents' car because of the allegedly excessive "amount of miles" on the car. Tr., vol. 4A, p. 12. Ariz. Rev. App., No. 13 at 12. The adjuster knew this statement was false and that respondents' car actually had *fewer* miles than the average car of its age. Indeed, because of its unusually low mileage, respondents' car was entitled to a Blue Book "mileage factor" *credit* of $250, which the claims adjuster included on his worksheet when estimating its Blue Book value. Ariz. Rev. App., No. 7.

After rejecting respondents' choice among the four cars identified by petitioner, petitioner's adjuster "selected one of the other cars and insisted that [respondents] take it." 733 P.2d at 1077; Pet. App. 4a. Respondents refused because this car "had few of the options their insured car had and was not comparable in either quality or gas mileage." *Id.*[1]

At that point, although petitioner's adjuster had himself concluded, based on his determinations of Blue Book value and dealer estimates, both of which he knew were less than fair market value, that the car had been worth *at least* $6,200-$6,545, he nevertheless told respondents, "in a take-it or leave-it fashion" (Pet. App. 41a), that "unless they took the car he had selected" he would only "pay them $4,500 in cash." 733 P.2d at 1077; Pet. App. 4a. *See also* Tr., vol. 1, p. 41; Ariz. Rev. App., No. 8 at 41. They refused. "Later, during the same conversation, [the adjuster] threatened to deliver a check for $5,000." *Id.*

Three days after petitioner's agent made this threat, respondents agreed to accept the car petitioner had insisted they accept. They purchased the car only after they were assured by petitioner's agent that the replacement car (which lacked power windows, had inferior gas mileage, and lacked other features of the insured car) would "be brought up to the insured car's standards." 733 P.2d at 1077; Pet. App. 5a. That assurance was not honored. For example, although respondents were not able to have power windows installed for less than $600, petitioner would only pay $125 towards that installation. 733 P.2d at 1077; Pet. App. 5a. Petitioner "refused to make any other adjustments and closed the file." *Id.*

---

[1] An auto mechanic familiar with both cars testified that "there was no comparison," that the car selected by petitioner's claims adjuster was worth "probably 75 percent of [respondents'] car," and that the "original car was [a] much, much better car, it was better equipped, more economical . . ." Tr., vol. 2, pp. 65-66; Ariz. Rev. App., No. 9 at 65-66.

Testimony by three of petitioner's former claims adjusters, including an adjuster employed at the Phoenix office that handled respondents' claim, established that this conduct was consistent with and required by a long-standing corporate policy. This testimony showed, *inter alia*, that petitioner's adjusters were instructed to make various deductions, including a $35 clean-up fee, from the fair market value of all claims, even though market value already reflected cleanliness, tire-wear, etc., and regardless of the insured car's actual condition.[2]

Adjusters were also instructed "to offer an insured the lowest value of a claim because the insured probably would take it in order to get his car fixed quickly;" and adjusters were "frequently" told that "if you could save one dollar on a million claims, you would save the company as much as a million dollars." These practices were clearly established "corporate policy." They were taught to adjusters at petitioner's regional claims schools, were repeated and emphasized by supervisors, and "were promulgated through corporate literature and policy statements." 733 P.2d at 1078; Pet. App. 6a-8a. This corporate policy had been in effect for up to 18 years. 733 P.2d at 1085; Pet. App. 21a.

Indeed, there was substantial evidence that adjusters who failed to implement this corporate policy would jeopardize their "opportunity to be promoted." Tr., vol. 4A, p. 38. Adjusters' "promotion potential" was regularly evaluated on the basis of how "severe" they had been in paying claims. 733 P.2d at 1078; Pet. App. 7a. Although adjusters who had not been sufficiently severe reduced their chances for promotion, "[i]f an adjuster does exceptionally well," and his claim payments were "substantially below the average" of the other adjusters

---

[2] In fact, an ex-claims adjuster from Petitioner's Phoenix office testified that adjusters were instructed to deduct the $35 clean-up fee even if the car was "brand new" and was destroyed as it left the dealer's lot. Tr., vol. 3A, pp. 23-24; Ariz. Rev. App. No. 11, pp. 23-24.

(all of whom were implementing petitioner's policy), "he would receive praise for it." This practice provided an "incentive . . . to offer as little as possible because it works to the adjuster's personal benefit." [3]

The jury concluded that petitioner's longstanding policy of deliberately paying less than fair market value on all automobile total loss claims warranted an assessment of $3.5 million in punitive damages. The trial judge, however, granted petitioner's motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient to sustain an award of punitive damages. In the alternative, the trial judge ordered a new trial. The court of appeals reversed the judgment n.o.v., concluding that the evidence of petitioner's "hardball tactics," Pet. App. 41a, was sufficient to justify an award of punitive damages. The court of appeals affirmed the order for a new trial, however, ruling, on state law grounds, that testimony by one witness was improperly admitted, and that the *amount* of the punitive damage award was not justified by the evidence.

The Arizona Supreme Court, which has a record of carefully reviewing punitive damage awards in insurance bad faith cases to determine if they were excessive, *see* note 15 *infra*, reinstated the jury verdict. After ruling that all of the challenged evidence was properly admitted, it ruled that the evidence was sufficient to support a punitive damage award of $3.5 million. The court considered whether the amount of damages was excessive "in light of the particular nature of [petitioner's] conduct," and held that "[t]he jury could have rationally concluded that [petitioner's] conduct was *highly reprehensible and resulted in harm to countless insureds*," who "would be unlikely to discover or prosecute this miscon-

[3] Tr., vol. 4A, p. 46. *See also id.* at 39 ("the message inescapable to an adjuster is that the lowest dollar is the best dollar as far as his performance rating is concerned"); Tr., vol. 3A, p. 39 (discussing petitioner's computerized "severity printouts" and its weekly meetings to evaluate adjusters' severity performance).

duct." 733 P.2d at 1085; Pet. App. 21a (emphasis added). The court also found that these "deceptive claims practices" had been "established company policy" for "up to 18 years." *Id.* And the court found that the punitive damage award was not "disproportionate" to the nature of the offense or to petitioner's financial position, because the award represented petitioner's net income for only 3½ days, or 1/25th of 1% of its total reported assets of $8.6 billion. 733 P.2d at 1084; Pet. App. at 20a.

The Arizona Supreme Court expressly declined to consider *any* of petitioner's constitutional challenges to punitive damages because those challenges were "belatedly urged" for the first time in a supplemental brief filed after oral argument in that court. 733 P.2d at 1086; Pet. App. 24a.

SUMMARY OF ARGUMENT

Certiorari should be denied because: a) petitioner expressly waived its Eighth Amendment argument, and failed to present its Due Process arguments below in a timely manner, as required by consistently applied state practice; b) petitioner waived two of its Due Process arguments by failing to object to jury instructions that were squarely inconsistent with those arguments; c) the decision below is not even alleged to be in conflict with any other lower court decision; d) the decision below is not even alleged to be directly inconsistent with any prior decision of this Court; and e) there is no urgent reason, in the context of this case, for the Court to resolve these constitutional questions, which implicate important and longstanding state interests.

The Eighth Amendment and Due Process challenges to punitive damage awards petitioner attempts to raise here are not novel legal theories. They have been raised without success in numerous lower courts over the past two decades. In this case, petitioner deliberately chose not to raise its Eighth Amendment challenge at *any*

stage below. And it chose not to raise any of its Due Process challenges at trial, in the intermediate appellate court, or in a cross petition to the Arizona Supreme Court. Instead, petitioner raised its Due Process challenges for the first time in a supplemental brief filed *after oral argument* in the Arizona Supreme Court. That court invoked a consistently applied state practice and expressly declined to consider those "belatedly urged" post-argument claims because "[e]fficient and orderly administration requires some point in time at which it is too late to raise new issues on appeal." 733 P.2d at 1086; Pet. App. 23a.

This Court has previously noted that the applicability of the Eighth Amendment and the Due Process Clause to punitive damage awards raises important questions that "*in an appropriate setting*, must be resolved," *Aetna Life Insurance Co. v. Lavoie*, 475 US 813, 89 L.Ed.2d 823, 837 (1986) (emphasis added). But this is not an appropriate setting in which to consider those questions.

First, although petitioner claims that its Eighth Amendment argument "is presently *sub judice* in this Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765" and is therefore "manifestly deserving of plenary consideration" (Pet. at 15), petitioner *expressly waived that Eighth Amendment argument in the Arizona Supreme Court.*[4] Point I.A.

Second, because petitioner failed to present any of its Due Process questions below in a timely manner, and the Arizona Supreme Court declined to consider them on a legitimate and consistently applied state ground,

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[4] Even in *Bankers Life* the Court did not separately grant certiorari to consider that Eighth Amendment issue, which is pending before the Court only on a tag-a-long writ of certiorari as ancillary to an appeal issue the Court was required to hear. The Appellee in *Bankers Life* has urged the Court to dismiss certiorari on that issue as improvidently granted on the ground that in that case, as here, the Eighth Amendment issue was not raised in the court below.

this case is not "an appropriate setting" to consider them. That is the lesson of *Judy's Foods, Inc. v. A & B Food Services Corp.*, 107 S Ct 460 (1986), which was decided after *Lavoie*. There, as here, petitioners asked the Court to consider the applicability of the Due Process Clause (and the Eighth Amendment) to a punitive damage award. The respondents argued that those questions were not appropriate for review because they had been raised for the first time in supplemental post-argument briefs in the highest court below. The Court denied review there, and petitioner has suggested no reason why review would be more appropriate here. Point I.B.

Third, petitioner waived two of its Due Process arguments—its challenge to the preponderance of the evidence standard and its challenge to the jury's consideration of the "duration" of its wrongful conduct—by failing to object to jury instructions that were squarely inconsistent with those arguments. Point I.C.

Furthermore, even if petitioner had raised its constitutional claims below in a timely manner, certiorari would still be inappropriate. The presumed decision below is not even alleged to be in conflict with any other decision, state or federal, and is not even alleged to be directly inconsistent with prior decisions of this Court. To the contrary, none of petitioner's constitutional arguments has been adopted by any court, and most of them have been rejected by several lower courts. Moreover, petitioner relies largely on *policy arguments* in urging this Court to overturn that substantial body of case law, and those policy arguments are being actively considered by state legislatures.[5] In these circumstances, the Court need not and should not re-examine this uniform body of case law to consider a constitutional resolution of

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[5] THE ECONOMIST, Aug. 1, 1987, at 29 (in recent years 41 states have modified their tort systems, and the rest are considering changes).

issues that are currently being addressed through the legislative process.[6] Point II.

ARGUMENT

I. THE ARIZONA SUPREME COURT DID NOT CONSIDER ANY OF THE CONSTITUTIONAL QUESTIONS PETITIONER SEEKS TO RAISE HERE, BECAUSE PETITIONER WAIVED SOME QUESTIONS AND FAILED TO RAISE OTHERS IN A TIMELY MANNER, AS REQUIRED BY CONSISTENTLY APPLIED STATE PRACTICE.

It is undisputed that the Arizona Supreme Court did not consider any of the constitutional questions petitioner seeks to raise here. It is undisputed that petitioner expressly waived its Eighth Amendment argument. It is undisputed that petitioner's Due Process arguments were asserted, for the first time, after oral argument in the Arizona Supreme Court. In these circumstances, the Arizona Supreme Court's refusal to consider those constitutional questions rested on adequate and independent state grounds.

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[6] Punitive damage awards have a two century history in state tort law. For years, the insurance industry did not question the constitutionality of such awards. In recent years, the industry has launched an aggressive campaign in legislatures and courts to restrict punitive damage awards. Although dressed in constitutional clothes, that campaign is based largely on policy arguments. For example, in urging the Court below to consider its constitutional arguments, petitioner argued that Arizona has strong *policy* interests that allegedly require limitations on such awards. Supplemental Brief of Appellees at 45 (warning that because of punitive damage awards "everyone in the state will suffer as a result of increased insurance premium rates. The State of Arizona has a very real interest in seeing to it that the pendulum does not swing too far against the insurance industry."). Those arguments are best addressed by the legislative process. If the insurance industry convinces legislatures that punitive damages are contrary to public policy and should be restricted, it will not be necessary for this Court to resolve the many constitutional issues raised by petitioner and other insurance companies.

A. Petitioner's Eighth Amendment Argument Was Explicitly Waived in The Arizona Supreme Court.

Petitioner's Eighth Amendment argument is inappropriate for review because petitioner expressly waived that argument below. In seeking the Arizona Supreme Court's permission to file post-argument briefs, petitioner suggested, for the first time, that the punitive damage award might violate the Eighth Amendment's Excessive Fines Clause. Motion for Leave to File Supplemental Briefs and for Additional Oral Argument at 6. In noting that potential issue, petitioner was fully aware of the consequences if it failed to press that issue in the Arizona Supreme Court. In petitioner's words: "[w]ithout the opportunity to brief this issue for consideration by the Arizona Supreme Court, it is unlikely that appellee would be afforded an opportunity to seek relief in the federal court system if punitive damages in any amount were untilmately [sic] assessed against appellee." *Id.* at 5-6.

Nevertheless, although petitioner did file a post-argument brief, petitioner decided not to assert that Eighth Amendment argument, and instead expressly waived that argument. In its post-argument brief, after observing that *Lavoie* involved constitutional challenges to punitive damages based on the Contracts Clause, the Eighth Amendment and the Due Process Clause, petitioner stated: "[f]or purposes of the case before the court at this time, the constitutional argument will be confined to the third-noted constitutional claim in *Lavoie*—the due process argument." Supp. Br. at 37. Thus, petitioner made a deliberate decision to waive any reliance on the Eighth Amendment.

Because petitioner expressly waived any reliance on the Eighth Amendment below, its attempt to invoke that Amendment for the first time in this Court should be denied. *See, e.g., Cardinale v. Louisiana*, 394 US 437, 438 (1969) (Supreme Court will not "decide federal con-

stitutional issues raised here for the first time on review of state court decisions.").[7]

B. Petitioner's Due Process Claims Were Not Raised Below In A Timely Manner.

Untimeliness is an adequate state ground that bars review by this Court. It has long been established that for this Court to have jurisdiction to review a state court decision "the essential federal question must have been especially set up there *at the proper time* and in the proper manner . . . ." *Godchaux Co. v. Estopinal*, 251 US 179, 181 (1919) (emphasis added). Where a state supreme court decides, in accord with the consistent practice of that state, that an issue is untimely, that constitutes an adequate state ground for resolving the issue, and this Court lacks jurisdiction. *E.g., Exxon Corp. v. Eagerton*, 462 US 176, 182-183 n.3 (1983).

Petitioner acknowledges Arizona's "general rule that an appellate court will not consider a question not first raised in the lower court." *See* Petitioner's Supp. Br. at 35. In this case, the Arizona Supreme Court correctly observed that petitioner had failed to "raise its constitutional arguments in the pleadings, post-trial motions, court of appeals, petition (or cross-petition) for review, response to petition for review, or at oral argument." 733 P.2d at 1086; Pet. App. 23a-24a. The court declined to consider those issues because "[i]n light of this procedural history, we believe it does not promote sound appellate practice to consider issues *so belatedly urged.*" 733 P.2d at 1086; Pet. App. 24a (emphasis added).

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[7] *Accord District of Columbia Court of Appeals v. Feldman*, 460 US 462, 482 n.16 (1983); *Webb v. Webb*, 451 US 493, 499 (1981); *Wilson v. Cook*, 327 US 474, 483-84 (1946); *McGoldrick v. Compagnie Generale*, 309 US 430, 434-35 (1940); *Whitney v. California*, 274 US 357, 362-63 (1927); *Tacon v. Arizona*, 410 US 351, 352 (1973); *Street v. New York*, 394 US 576, 582 (1969); *Bailey v. Anderson*, 326 US 203, 207 (1945).

Petitioner argues, relying primarily on *Town of South Tucson v. Board of Supervisors*, 52 Ariz. 575, 583, 84 P.2d 581 (1938), that the Arizona Supreme Court acted improperly in declining to consider petitioner's post-argument claims. There, the court held that although it "ordinarily" would not consider issues raised for the first time on appeal, it could do so if the issue was "of a general public nature, affecting the interests of the state at large . . . ." 84 P.2d at 584. Petitioner argues that under that exception to the general rule, the Arizona Supreme Court should have considered its post-argument constitutional claims because they concerned matters of statewide importance.[8]

In making that argument, however, petitioner has been able to cite only cases in which a state's procedural requirements were *not* evenhandedly applied. *See Barr v. Columbia*, 378 US 146, 149 (1964); *Sullivan v. Little Hunting Park*, 396 US 229, 245 (1969) (Harlan, J., dissenting).[9] Petitioner's contention that the Arizona Supreme Court's decision not to consider petitioner's post-

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[8] Actually, one of petitioner's principal issues—that due process requires "clear and convincing" proof before a jury can award punitive damages—was *not* an issue of statewide importance because, prior to the decision in this case, the Arizona Supreme Court decided, as a matter of common law *policy*, to require that standard in all future punitive damages cases. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

[9] Although in *Sullivan* the Court distinguished discretionary and jurisdictional rules, the great weight of authority suggests that even where procedural requirements have some element of discretion, these rules can serve as adequate state grounds where the rule is applied evenhandedly and furthers legitimate state interests. Thus Stern, Gressman & Shapiro have explained that "as long as the local procedure is applied evenhandedly and consistently, does not discriminate against the raising of federal claims, and is not used to stifle a federal claim or to evade vindication of federal rights [citing cases], the Supreme Court is likely to respect the local procedural requirement and to hold a ruling grounded on state procedure is adequate to support the judgment." R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 181 (6th ed. 1986) (citations omitted).

argument claims constituted a "complete departure" from its settled practice, Pet. at 17-18, is completely unfounded. In the fifty years following its decision in *Town of South Tucson*, the Arizona Supreme Court has agreed to decide new issues raised by appellants because of their "statewide" significance in only a few cases, and *in every one of those cases the issue was raised by the party in a timely manner.*[10] As the court below correctly reasoned, declining to consider petitioner's post-argument claims was compelled by the policy underlying its general rule: assuring the efficient and orderly administration of justice. 733 P.2d at 1086; Pet. App. 23a.

Petitioner has not cited a single case, and respondents are not aware of any, in which the Arizona Supreme Court considered an issue raised by a party for the first time after oral argument in that court. Accordingly, there is no support for petitioner's contention that Arizona's timeliness rule has been applied in an inconsistent manner.

Because the Arizona Supreme Court's decision not to consider petitioner's Due Process claims was based on the adequate and consistently applied state ground that they were untimely, the petition for certiorari should be denied.[11] See *Judy's Foods, Inc. v. A & B Food Services*

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[10] In *Town of South Tucson, Ruth v. Industrial Commission*, 107 Ariz. 572, 490 P.2d 828 (1971), and *Defnet Land & Investment Co. v. State*, 103 Ariz. 388, 442 P.2d 835 (1968), the appellants' new arguments were raised at the outset of their appeals to the Arizona Supreme Court. The other case cited by petitioner, *Barrio v. San Manuel Division Hospital*, 143 Ariz. 101, 692 P.2d 280 (1984), provides no support for petitioner's position because in that case the parties did not belatedly ask the Court to address issues they had neglected to raise below. Instead, in *Barrio* the court itself determined that there were additional issues that required briefing and it ordered the parties to address those issues.

[11] The second basis for petitioner's contention that the lower court should have considered its constitutional claims merits only brief response. Petitioner argues that "an appellee . . . may raise on appeal any argument in support of the judgment below so long as that argument would not, if successful, expand its rights under

Corp., 107 S Ct. 460 (1986) (denying certiorari in similar circumstances).

C. Even If Petitioner's Due Process Challenges to the Preponderance Of The Evidence Standard and To The Jury's Consideration Of The "Duration" Of Petitioner's Misconduct Had Been Timely, The Arizona Supreme Court Would Not Have Considered Those Challenges Because Petitioner Failed to Object to Jury Instructions That Were Directly Inconsistent With Those Challenges.

Although the Court should deny certiorari on all of petitioner's Due Process claims because they were not raised in a timely manner, Point I.B., the Court should

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the judgment or contract the rights of the appellant." Pet. at 18. The only case petitioner cites, *Maricopa County v. Corporation Commission*, 79 Ariz. 307, 289 P.2d 183, 185 (1955), does not support the proposition that appellees can raise claims on appeal that were not raised below. Indeed, as *Maricopa* and other Arizona cases make clear, even if a claim *was* raised below, an appellee cannot rely on that claim on appeal unless the appellee has complied with additional procedural requirements. If the claim was raised and *rejected* below, the appellee cannot "present [that] rejected claim []" on appeal unless the appellee files "a cross-appeal." *Maricopa*, 289 P.2d at 185. Thus, because appellee's claims in *Maricopa* had been raised but rejected in the lower court, the appellate court refused to consider those claims on appeal since "it was necessary for appellee to cross-appeal by giving notice of appeal." *Id.* Furthermore, if a claim was raised but not decided in the lower court, the appellee need not file a "cross-appeal," but must nevertheless file a "designation of cross-question presented" or a "cross-assignment of error" in order to rely on that claim on appeal. *Santanello v. Cooper*, 106 Ariz. 262, 475 P.2d 246, 249 (1970); *Arizona Public Service Co. v. Mountain States Telephone and Telegraph Co.*, 149 Ariz. 239, 717 P.2d 918, 922 (Ct. App. 1985).

Furthermore, even if the legal principle stated by petitioner were correct, it would be inapplicable to petitioner's constitutional arguments because acceptance of those arguments would expand petitioner's rights under the trial court's new trial order. In particular, petitioner would have a right at the new trial to numerous procedural protections that were not afforded by the trial court's order.

also be aware that two of petitioner's Due Process claims—its challenge to the preponderance of the evidence standard, Pet. at 25-27, and to the jury's consideration of the "duration" of its misconduct, *id.* at 22—were not properly before the Arizona Supreme Court for an additional reason. Petitioner waived these constitutional challenges by interposing no objection to jury instructions that were squarely at odds with them.[12] Although the trial court made explicit determinations about the appropriate standard of proof and the relevance or irrelevance of the duration of petitioner's misconduct, petitioner did not object to those determinations, or to the jury instructions that embodied them.

The Arizona Rules of Civil Procedure explicitly provide that "[n]o party may assign as error the giving . . . of an instruction unless he objects thereto before the jury retires to consider its verdict . . ." Ariz. R. Civ. P. 51(a). Accordingly, it is well established in Arizona that "[a] failure to object waives the right to attack such . . . instructions on appeal." *Andrew Brown Co. v.*

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[12] Petitioner did object to any instruction on punitive damages, on the ground that there was insufficient evidence to allow the jury even to consider an award of punitive damages. Tr., vol. 5, pp. 16-19. But the trial court denied that objection, and petitioner did not then object to the form or content of the court's punitive damage instructions concerning the standard of proof or the jury's consideration of the duration of petitioner's misconduct. Accordingly, at trial the jury was instructed without objection that "[i]f you find by a *preponderance of the evidence* that the conduct of the Defendant . . . has been wanton, malicious, oppressive, willful or in reckless disregard of the rights of others, as those terms have been defined for you, then, you may in your sole discretion assess additional damages . . . known as punitive or exemplary damages . . . ." Tr., vol. 6, p. 9 (emphasis added). The jury was also instructed, without objection, that in determining the amount of any punitive damage award it could consider the defendant's wealth, "the harm caused, *the duration of any misconduct*, the profitability of any misconduct, and the degree and nature of such Defendant's conduct, and the sum which might be sufficient to require such Defendant to alter its conduct and to deter it, and others from the same sort of conduct in the future." *Id.* (emphasis added).

Painters Warehouse, Inc., 111 Ariz. 404, 531 P.2d 527, 530 (1975).[13]

Petitioner's failure to object to the jury instructions in this case is especially inexcusable because of the decision of the Arizona Court of Appeals in *Ahmed v. Collins*, 23 Ariz. App. 54, 530 P.2d 900 (1975). In *Ahmed*, the defendants argued on appeal (as petitioner sought to argue in the Arizona Supreme Court and here), that "the method by which the jury was allowed to assess [punitive] damages was unconstitutional." The court refused to consider that claim, ruling that "the instructions on punitive damages were not objected to in the trial court and defendants cannot now complain." 530 P.2d at 904. In view of that recent and controlling decision petitioner was plainly on notice that its failure to object to the trial court's instructions concerning the method by which the jury would assess punitive damages would constitute a waiver of its right to challenge on appeal the standard of proof and the jury's consideration of the duration of its misconduct.

II. EVEN IF PETITIONER HAD PROPERLY RAISED ITS CONSTITUTIONAL CLAIMS BELOW, IT WOULD BE INAPPROPRIATE TO GRANT CERTIORARI.

Even if petitioner had timely raised all of its constitutional claims, and the Arizona Supreme Court had resolved all of them against petitioner, this would still not be an appropriate case in which to grant discretionary review. Petitioner does not argue that such a decision would have been in conflict with any other decision, state or federal, and it would not. Petitioner does not argue that such a decision would have been directly inconsistent with any prior decision of this Court, and it would not.

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[13] *E.g., Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 652 P.2d 507 (1982); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1135 (1982), *cert. denied*, 459 US 1070 (1982); *Southern Pacific Transportation Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599, 612 (1975).

Moreover, as respondents will now show, such a decision would not have raised important issues that urgently require resolution by this Court.

A. Petitioner's Claim That the Punitive Damage Award Was Excessive Under the Constitution Does Not Warrant Discretionary Review.

1. *Petitioner's Eighth Amendment Argument.*

After making a deliberate decision that its Eighth Amendment argument did not even warrant briefing in the Arizona Supreme Court, petitioner has resurrected that argument in its petition. Although petitioner's pursuit of that argument here is plainly foreclosed by its waiver below, even if this were not so it would be inappropriate to grant certiorari on petitioner's Eighth Amendment claim. Because that claim has been raised as a tag-a-long issue in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, *see* note 4 *supra*, and has been extensively briefed in that case, respondents here will only briefly state the reasons why there is no urgent reason to review that issue in the context of this case.

First, petitioner's Eighth Amendment argument is directly contrary to this Court's prior decisions that the Eighth Amendment is inapplicable to civil proceedings. *Ingraham v. Wright*, 430 US 651 (1977) (reasoning that Eighth Amendment was intended to protect those "convicted of crimes" and to limit the power of *government* to fine or punish for its own benefit); *see* Appellee's Brief in *Bankers Life* at 27-28.

Second, petitioner's position has been uniformly rejected by the lower courts. *See Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987); *Downey Savings and Loan Ass'n v. Ohio Casualty Insurance Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987); *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc); *Unified School District No. 490 v. Celotex Corporation*, 6 Kan. App. 2d 346, 629 P.2d 196, 206 (1981); *Daugh-*

erty v. Firestone Tire & Rubber Co., 85 F.R.D. 693, 695 (N.D. Ga. 1980); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, 144 (1976).

Third, this Court's decision in *Ingraham*, and the unanimous body of lower court decisions, are so clearly supported by the common law and colonial history of the Eighth Amendment that there is no need for reexamination of this issue. Appellee's Brief in *Banker's Life* at 30-35. And see in that case the brief of *amici* Consumers Union of U.S., Consumer Federation of America and National Consumer League at 6-40.

Finally, even if the Excessive Fines Clause did impose substantive limits on the size of punitive damage awards to plaintiffs in civil litigation, an award would only be "excessive" if it was not proportional to the gravity of petitioner's offense or deprived petitioner of its means of livelihood. Appellee's Brief in *Banker's Life* at 37-41. Because the Arizona Supreme Court applied this test as a matter of common law, and determined that the jury's award was not excessive, acceptance of petitioner's argument would not dictate a different result in this case.

2. *Petitioner's Due Process Arguments.*

In the first of its many due process arguments, petitioner asserts that the jury's award was reinstated "only after an extraordinary exercise by the court below of judicial gymnastics in which the rules of the game were changed or ignored wherever necessary in order to reinstate the excessive award," and that the alleged improprieties of the Arizona Supreme Court violated the Due Process Clause. Pet. at 22. In petitioner's view, these so-called "gymnastics" included the court's holding that the "duration" of petitioner's misconduct could be considered in determining the amount of punitive damages that should be assessed, and deciding that the verdict was not excessive when that issue allegedly "had not been presented to the court by respondents.' Each argument is meritless.

Petitioner's claim that the Arizona Supreme Court changed "the rules of the game" by considering the duration of petitioner's conduct is remarkable in view of the fact that the trial court instructed the jury on this very issue, without any objection from petitioner. Thus, from the first stage of these proceedings the petitioner knew the "rules of the game" and accepted them as an accurate statement of Arizona law. That acceptance is not surprising, because the Arizona courts' view that duration of misconduct can be considered in deciding the amount of punitive damages is a straightforward application of the well established principle that the egregiousness of a defendant's conduct and the amount required to deter future misconduct are relevant in determining the appropriate award.[14]

Petitioner's assertion that in sustaining the amount of the punitive damage award the Arizona Supreme Court decided issues that were not before it, and thereby denied petitioner due process, is equally meritless. In challenging the court of appeals' conclusion that "the punitive damages were excessive because there was no proof of the specific amount of illicit profit made" by petitioner, respondents expressly raised as one of the questions before the Arizona Supreme Court whether the jury's "assessment of punitive damages amounting to 3½ days net

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[14] *See, e.g., Rubi v. Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891, 894 (1982); *Flieger v. Reed*, 120 Ariz. 31, 583 P.2d 1351 (1978); *Acheson v. Shafter*, 107 Ariz. 576, 490 P.2d 832 (1971); RESTATEMENT (SECOND) OF TORTS § 908 (1979) (purpose of punitive damages is "to deter him and others like him from similar conduct in the future"). If a defendant has repeatedly engaged in certain misconduct for a long period of time, this misconduct is likely to have generated larger profits, and is more likely to be ingrained, than isolated misconduct, and the duration of that misconduct would therefore justify a larger award to deter similar misconduct in the future. On appeal, petitioner conceded that "duration of misconduct may be a factor that can be considered" if the past misconduct is relevant to the misconduct currently at issue. Response to Petition For Review to Arizona Court of Appeals at 12.

income of the defendant and based upon evidence of a systematic and profitable scheme of misconduct affecting many people" could be upheld even without evidence of the specific amount of petitioner's illicit profit. Pet. App. 71a, 67a. In its briefs in the Arizona Supreme Court, petitioner did "not take issue with the principle that a jury may determine the amount of punitive damages upon sufficient evidence," but argued at length that the jury's award of $3.5 million in punitive damages was "unsupported by the evidence." Appellee's Supplemental Reply Brief at 2; *see* Supplemental Brief of Appellee at 31-34 (arguing that "the evidence does not support the jury's $3.5 million punitive damage award").

On this record, it is difficult to understand the basis for petitioner's claim that the Arizona Supreme Court violated petitioner's constitutional rights in deciding whether the jury verdict was excessive. Petitioner seems to be implying that the Arizona Supreme Court simply manipulated the law and the issues before it in an unprincipled effort to uphold the punitive damage award. This implication is completely unsupported by the record, and is frivolous in view of the Arizona Supreme Court's history of carefully scrutinizing punitive damage awards in insurance bad faith cases.[15]

B. Petitioner's Claim That Punitive Damages Can Only Be Imposed If Every Constitutional Safeguard Available in Criminal Trials Has Been Provided Does Not Warrant Discretionary Review.

Petitioner's suggestion that the "constitutional protections due to defendants in criminal cases" must be afforded to defendants in civil cases before punitive dam-

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[15] The Arizona Supreme Court has struck down virtually every punitive damage award it has reviewed in insurance bad faith cases. *See Gurule v. Illinois Mutual Life & Cas. Co.*, 735 P.2d 85 (Ariz. 1987); *Filasky v. Preferred Risk Mutual Ins. Co.*, 735 P.2d 76 (Ariz. 1987); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

ages can be awarded has been uniformly rejected by the lower courts.[16] Furthermore, even if petitioner's claim

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[16] *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984) (holding double jeopardy clause inapplicable to punitive damage award to private litigant because the determination in such a proceeding "does not carry with it the consequences" necessary for a proceeding to be deemed "essentially criminal," the defendant would "not suffer the stigma normally accompanying criminal proceedings," and "this is not an action brought by the state, but one brought by a private individual"), *cert. denied*, 470 US 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987) (rejecting defendant's contention that imposition of punitive damage award without safeguards present in criminal proceedings was a denial of due process, because punitive damage action was civil rather than criminal in nature); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986) (rejecting claim that punitive damage award violated due process because of its allegedly quasi-criminal nature); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985) (rejecting claim that punitive damage award "constitutes criminal punishment requiring constitutional guarantees," because court could find "no case law supporting these propositions," and award of punitive damages did not involve finding that defendant violated criminal laws, no stigma attached to punitive award, and the action was privately filed and funded); *Peterson v. Superior Court*, 181 Cal. Rptr. 784, 642 P.2d 1305 (Supr. Ct. 1982) (rejecting claim that ex post facto clause was applicable to civil case involving punitive damages, because "[t]he potential punitive damage award in this case is unquestionably a penalty civil in nature. There is no possibility of the stigma of a criminal conviction nor the potential loss of personal freedom."); *Unified School District No. 490 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196, 206 (1981) (holding that imposition of punitive damages did not violate constitutional guarantee of due process or defendant's right to protection against double jeopardy, reasoning that the imposition of punitive damages "does not approach the severity of criminal sanctions and does not demand the same safeguards as do criminal prosecutions"); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348, 383 (1981) (rejecting claims that ex post facto and double jeopardy prohibitions were applicable to award of punitive damages in civil case); *Gibson v. Gibson*, 15 Cal.App.3d 943, 93 Cal. Rptr. 617, 621 (1971) (rejecting claim that "due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings" involving punitive damages);

did raise substantial constitutional questions, it would be inappropriate to review those questions in the posture they are presented here. Instead of arguing that it was denied a particular constitutional right, and seeking review of that discrete issue, petitioner asserts that *every* constitutional right provided in criminal proceedings must be afforded in civil cases when punitive damages are sought. This blunderbuss claim therefore encompasses an extraordinarily broad range of criminal procedures and rules, including the right against double jeopardy, the right of confrontation, proof beyond a reasonable doubt, trial by jury (and associated rights concerning the size of the jury and the need for a unanimous verdict), the right to effective assistance of counsel, the right to a speedy trial, the right against self-incrimination, and many others.

As this Court has often explained, "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own

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People v. Superior Court, 115 Cal. Rptr. 812, 819 (Supr. Ct. 1974) (availability of punitive damages "does not convert a civil action into a criminal action" and privilege against self-incrimination is inapplicable to that action); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398, 417-18 (Ct. App. 1967) (rejecting claim that imposition of punitive damages in civil case was unconstitutional because defendant received only six peremptory challenges, a unanimous verdict was not required, the vote of nine jurors was allowed to impose a penalty, and defendant was denied the presumption of innocence). *See generally United States v. Ward*, 448 US 242 (1980) (provision in Federal Water Pollution Control Act authorizing penalty payable to government "revolving fund" of up to $5,000 for each violation of Act, which was assessed by considering the size of the business, the effect on the owner's ability to continue in business, and the gravity of the violation, was a civil penalty and Fifth Amendment's protection against self-incrimination was inapplicable); *Sedima, S.P.R.L. v. Imrex Co.*, 473 US 479 (1985) (expressing doubts that plaintiff in civil action under Racketeer Influenced and Corrupt Organizations Act must prove that predicate criminal offenses for RICO violation were committed "beyond a reasonable doubt" despite availability of treble damages if plaintiff prevailed).

impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey*, 384 US 719, 728 (1966); *accord Brown v. Louisiana*, 447 US 323 (1980). For example, as we have explained, the Eighth Amendment is clearly inapplicable to punitive damage awards to private litigants, because the historical function of that Amendment has been to afford protection against the *government*.[17] Similarly, this Court has ruled that some of the criminal protections available to individual criminal defendants are "personal" rights and are *not* available to corporate entities.[18] Rather than deciding whether these procedures should be imposed *en masse* in civil proceedings in which private litigants seek punitive damages from corporate entities, if this Court decides to review these constitutional issues it should do so in cases where specific procedures have been requested and have been at issue, so the Court can carefully consider the history and function of each specific procedure and its applicability to proceedings seeking punitive damages from corporate entities.

This approach is dictated not only by the distinct histories and functions of different criminal procedures, but also by considerations of judicial restraint. Acceptance of petitioner's draconian position would have extraordi-

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[17] *Cf. Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 430-31 (1967) ("Of the many policies which authorities have suggested as underlying the privilege against self-incrimination, several reflect a common fear of abuse of government power through the criminal process.").

[18] Petitioner's claim assumes, for example, that a *corporate entity* can invoke the right of an individual criminal defendant not to incriminate himself. This Court has ruled to the contrary. *California Bankers Ass'n v. Shultz*, 416 US 21 (1974); *cf. Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations); *see generally First National Bank of Boston v. Bellotti*, 435 US 765, 778-79 n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

nary consequences for state tort systems.[19] To provide only a few of countless possible examples: (1) If the Double Jeopardy Clause were applicable to all civil cases in which punitive damages were sought (encompassing a very broad range of conduct regulated by the common law), governmental law enforcement efforts to challenge the same or related conduct would be significantly impeded. To avoid having criminal prosecutions (or civil cases seeking punitive damages) foreclosed by other proceedings to which "jeopardy" attaches, law enforcement officials (and private litigants) would be forced to engage in a "race to the courthouse." (2) Because plaintiffs can ordinarily seek punitive damages only in civil cases in which compensatory or other damages are available, and because criminal safeguards are not even arguably required before these other damages can be awarded, acceptance of petitioner's position would require radical changes in the conduct of civil cases where punitive damages are sought. Although criminal safeguards would be required on the punitive damages issues, the other issues would be governed by the procedures traditionally employed in civil cases: thus, lower courts and juries would have to apply one set of rules for punitive damages claims and different rules for the plaintiff's other claims (*e.g.*, a less than unanimous verdict would be permissible on the other claims, different standards of evidence would apply, etc.).[20]

In short, the unprecedented path on which petitioner asks this Court to embark would require wholesale revision of state tort systems by the judiciary (at a time

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[19] *See generally Silkwood v. Kerr-McGee Corp.*, 464 US 238, 255 (1984) (recognizing that "[p]unitive damages have long been a part of traditional state tort law").

[20] Similarly, a civil plaintiff's ability to take discovery—even with respect to its claim for compensatory damages—would be significantly impeded, because no individual could be compelled to provide information that could arguably subject him to a punitive damage award and thus violate his right against "self-incrimination."

when the legislative and electoral process is actively considering the wisdom of legislating procedural and substantive changes).[21] Even if the Court decided it was essential to address some of these constitutional issues now, instead of waiting until this nationwide legislative debate is completed, it would be appropriate to do so in a cautious and careful manner. For this reason, the Court should decline to review petitioner's effort to raise all of those issues here.

Finally, it would be inappropriate to allow petitioner to raise the applicability of any of these criminal procedural protections, all of which apply at the trial level, because petitioner did not request any of these procedural protections at trial. Petitioner never claimed below (or even here) that respondents' lawsuit actually subjected petitioner to double jeopardy or forced petitioner to incriminate itself, or violated petitioner's right to a speedy trial. Petitioner did not object to jury instructions embodying the civil standard of proof, the size of the jury (eight) would have been constitutionally sufficient even in a criminal case,[22] and the jury's verdict was, in fact, unanimous. Tr., vol. 6, pp. 10, 13.

C. Petitioner's Claim That Even In Civil Cases The Due Process Clause Requires "Clear and Convincing Evidence" Before Punitive Damages Can Be Imposed Does Not Warrant Discretionary Review.

Although petitioner did not object when the trial judge instructed the jury that punitive damages could be awarded if the requisite showing was made by a "pre-

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[21] Art. 2 Section 31 and Art. 18 Section 6 of the Arizona Constitution prohibit statutory limitations on the amount of damages that can be recovered for injuries. A referendum initiative, Proposition 103, that would have amended the Constitution to permit legislative restrictions on the amount of punitive damage awards was defeated by the electorate at the Fall, 1986 election.

[22] *Williams v. Florida*, 399 US 78 (1970) (upholding constitutionality of six person jury in criminal cases); *see Ballew v. Georgia*, 435 US 223 (1978).

ponderance of the evidence," petitioner now claims that the Due Process Clause requires the "clear and convincing" standard of proof even in civil proceedings, before punitive damages can be imposed. Relying on cases in which the Court required this higher standard to be met before the government could permanently terminate parental rights,[23] and before the government could involuntarily commit an individual to a mental institution for a potentially unlimited period of time,[24] petitioner argues that a multi-billion dollar corporation being sued for punitive damages by one of its insureds is entitled to the same heightened protection.

Even if the Arizona Supreme Court had considered this constitutional claim and had resolved it against petitioner, that decision would not be appropriate for review because any decision by this Court would directly affect only petitioner, and would not affect any other persons subject to the jurisdiction of the court below. *Rice v. Sioux City Memorial Park Cemetery*, 349 US 70, 79 (1954) ("'it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties'") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 US 387, 393 (1923)). Because the Arizona Supreme Court has now decided, as a matter of common law policy, that all future punitive damage cases in that state will be governed by the "clear and convincing" standard, this issue is no longer of importance in the only jurisdiction bound by decisions of the Arizona Supreme Court. *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

It would also be inappropriate for the Court to review petitioner's claim concerning the standard of proof in order to resolve this issue immediately and establish a binding constitutional rule for other jurisdictions. In

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[23] *Santosky v. Kramer*, 455 US 745 (1982).

[24] *Addington v. State of Texas*, 441 US 418 (1979).

contrast to petitioner's other constitutional arguments, respondents are aware of no lower court case in any jurisdiction that has decided this constitutional claim. The doctrine of judicial restraint teaches that this issue can most appropriately be resolved by first allowing the lower courts to consider and address different arguments concerning this issue, and thereby develop an informed body of case law this Court can look to if it ultimately proves necessary to review this issue. *See, e.g., McCray v. New York*, 461 US 961, 963 (1983) (Opinion of Stevens, J., joined by Blackman, J., and Powell, J., respecting denial of several certiorari petitions) (denying certiorari "to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court"). This is especially true in the circumstances of this case, for if the insurance industry is successful in persuading lower courts, as a matter of *common law*, or state legislatures, as a matter of policy, to adopt a clear and convincing evidence standard, it will not be necessary for this Court to consider petitioner's constitutional argument.[25]

D. Petitioner's Claim That The Due Process Clause Requires That Common Law Rules Restricting the Imposition of Punitive Damages Be Applied To All *Civil* Cases Pending on Appeal Does Not Warrant Discretionary Review.

Petitioner's final constitutional challenge to the punitive damage award is based on the fact that after adopting the "clear and convincing" standard as a matter of common law in *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986), the Arizona Supreme Court declined to apply that standard to this case, even though this case was argued on the same day as *Linthicum*. Petitioner states that "[i]t would be difficult to posit two cases in which two similarly situated

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[25] *See* Pet. at 25-26 & nn. 9 & 10 (indicating that four state courts have modified the common law on policy grounds, and six states have passed legislation, to impose a heightened standard of proof in punitive damage actions).

defendants had been subjected to more disparate treatment . . . ." Pet. at 28. Petitioner argues that under the principle established by this Court's decision in *Griffith v. Kentucky*, 93 L Ed 2d 649 (1987), it is unconstitutional for a state court not to apply a common law restriction on punitive damages to civil cases pending on appeal. *Id.*[26]

In claiming that it was treated differently from the defendant in *Linthicum*, petitioner has neglected to mention a crucial fact. The Arizona Supreme Court found the evidence before it in *Linthicum* insufficient to justify punitive damages, but it did *not* reach that result because of its application of a higher standard of proof. Instead, the court expressly stated that the evidence was insufficient to permit punitive damages *"irrespective of whether the burden of proof is clear and convincing evidence or the lesser standard of a preponderance of the evidence."* 723 P.2d at 681 (emphasis added). Thus, there is no factual basis for petitioner's claim that it was a victim of "disparate treatment."

Furthermore, even if there were a factual basis for petitioner's claim, petitioner's legal claim does not present a substantial issue. In *Griffith*, this Court held that the constitution requires that new rules governing "the conduct of *criminal prosecutions*" must be applied retroactively to pending cases. 93 L Ed 2d at 661 (emphasis added). At the same time, the Court expressly reaffirmed the well established and quite different rule for civil cases, stating that "the area of civil retroactivity . . . continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*, 404 US 97, 106-107 (1971)."

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[26] Petitioner also briefly suggests that if the Court addresses the tag-a-long issue in *Bankers Life* and holds that "the Eighth Amendment applies to . . . punitive damage awards in civil cases," the Court will need to decide the applicability of that holding to this case. Pet. at 28. As explained earlier, however, no Eighth Amendment issue is properly raised in this case because petitioner expressly waived its Eighth Amendment claim in the court below. Point I.A.

93 L Ed 2d at 657 n.8. That is the standard the Arizona Supreme Court applied. 733 P.2d at 1087; Pet. App. 25a.

Because the lower courts have uniformly rejected contentions that cases seeking punitive damages must be treated like criminal cases, *see* Point II.B, *supra*, there is no need to reexamine the lower court's decision to apply *Huson*'s civil test here.[27]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[27] Applying the *Huson* test, the Arizona Supreme Court held that the *Linthicum* rule need not be applied retroactively. Petitioner has not argued here that the Arizona Supreme Court incorrectly applied the three prongs of the *Huson* test. In particular, the Arizona Supreme Court ruled that retroactive application of the *Linthicum* rule was not compelled by the policy underlying that rule. 733 P.2d at 1087; Pet. App. 26a. The Arizona Supreme Court was of course well acquainted with the policy considerations that led it to adopt the *Linthicum* rule as a matter of Arizona common law, and was therefore best situated to determine whether those policy considerations required retroactive application of that common law rule in this case.

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No. 87-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLSTATE INSURANCE CO.,
Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,
Respondents.

REPLY MEMORANDUM

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. JURISDICTION	1
a. *The Practice of the Court Below*	2
b. *Petitioner Did Not "Waive" Its Eighth Amendment Claim*	6
c. *Petitioner Is Entitled to the Benefit of Any Decision of this Court Applying the Eighth Amendment to Punitive Damage Awards*	8
2. THE URGENT NEED FOR RESOLUTION OF THE QUESTIONS PRESENTED	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Aetna Life Insurance Co. v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S.Ct. 1580 (1986)	8, 9
Bankers Life and Casualty Co. v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987)	9
Barr v. *City of Columbia*, 378 U.S. 146 (1964)	3, 5
Barrio v. *San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984)	3
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967)	7
Eddings v. *Oklahoma*, 455 U.S. 104 (1982)	8
Gosewisch v. *American Honda Motor Co.* ___ Ariz. ___ , 737 P.2d 376 (1987)	5
Illinois v. *Gates*, 462 U.S. 213 (1983)	10
Judy's Foods, Inc. v. *A&B Food Services Corp.*, 798 F.2d 468 (6th Cir.), *cert. denied*, 107 S. Ct. 460 (1986)	4
Linthicum v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986)	*passim*
New York ex rel. Byrant v. *Zimmerman*, 278 U.S. 63 (1928)	8
Pruneyard Shopping Center v. *Robins*, 447 U.S. 74 (1980)	2
Sullivan v. *Little Hunting Park*, 396 U.S. 229 (1969)	5

FEDERAL CONSTITUTION:

Eighth Amendment (Excessive Fines Clause) .. *passim*
Fourteenth Amendment (Due Process Clause) .... *passim*

STATE CONSTITUTION AND STATUTES:

Ariz. Const., Art. 18, § 5 5
Ariz. Rev. Stat. § 12-683(3) 5

REPLY MEMORANDUM

The primary thrust of respondents' Brief in Opposition ("Br. in Opp.") is that the refusal of the court below to decide the federal questions tendered to it by petitioner deprives this Court of jurisdiction over this case because that refusal was based on what respondents characterize as a "consistently applied state practice," Br. in Opp., at 10, of declining to decide questions raised for the first time on appeal. Respondents make a related jurisdictional argument that petitioner "waived" its Excessive Fines Clause argument and certain of its Due Process Clause arguments and that there is "no urgent reason" for the Court to undertake review of these federal questions either because they are foreclosed by prior decisions of the Court or because the Court would benefit from further development of these questions by lower courts prior to their ultimate resolution.

Although respondents' arguments were, in the main, anticipated in the petition, respondents' mischaracterization of the pertinent practice of the court below regarding review of state and federal constitutional questions raised for the first time on appeal warrants a detailed reply. Certain other points raised by respondents will be treated summarily.

1. **Jurisdiction.** Respondents argue that the refusal of the court below to decide petitioner's federal questions constitutes an independent and adequate basis for depriving the Court of jurisdiction over this case. Respondents recognize that this argument depends entirely on whether the court below consistently refuses to entertain questions raised for the first time on appeal. Br. in Opp., at 12-14.[1]

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[1] None of respondents' arguments would preclude the Court's consideration of Question 4. As petitioner points out, Pet. Cert., at 20 n.7, the court below could not reinstate the jury's verdict and thereby deprive petitioner of its right to a new trial unless it first refused to

However, the decision in this very case demonstrates that the court below presently asserts absolute discretion to decide dispositive federal and state law questions irrespective of whether such questions have been timely raised in the lower Arizona courts or raised and briefed by the parties in the court below. Thus, reliance on the "consistent practice" of the court below is of no avail to respondents because their characterization of that practice, historical and current, is incorrect. Respondents' assertion, Br. in Opp., at 7, that petitioner "expressly waived" its Eighth Amendment challenge to the excessiveness of the $3,500,000 punitive damage award, is also demonstrably incorrect.

a. *The Practice of the Court Below.* Until the decision of this case, the court below routinely decided federal and state constitutional questions raised for the first time in that court if the questions were of "general statewide significance." Pet. Cert., at 15-18. Although respondents label petitioner's reliance on this historic practice "completely unfounded," Br. in Opp., at 14, they do not draw to the Court's attention so much as a single case in which the court below has ever departed from this practice. Nor do respondents seriously dispute that all of petitioner's federal questions qualified as ones of "general statewide significance."[2] The court below left no doubt that it had

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apply to this case its decision in *Linthicum* v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986). Thus, Question 4 did not arise until after the decision of the court below. It was presented to the court below at the first opportunity, in petitioner's Motion for Reconsideration. Pet. Cert., at 14-15; Pet. Cert., App. 55a-58a. This presentation was manifestly more than adequate under decisions such as *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980) (federal questions arising from decision of highest state court need not be presented to that court prior to seeking review in this Court).

[2] Respondents suggest, Br. in Opp., at 13 n.8, that Question 3 regarding the requirement of proof by "clear and convincing" evidence was not an issue of statewide importance because by the time the court below ruled in this case, it had adopted petitioner's argument as a matter of state law in *Linthicum*. But, as petitioner points out, Pet.

"the power to consider the constitutional issues raised by Allstate." Pet. Cert., App. 23a, 733 P.2d, at 1086.

Instead, respondents attempt to distinguish the cases in which the court below has, *without departure*, followed this practice. Those cases are, however, indistinguishable,[3] and,

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Cert., at 9, 13, that the court below chose to use *Linthicum* rather than *Hawkins* as the vehicle for resolving this question does not negate the fact that this question, whether presented as one of state or federal law, was one of "general statewide significance."

[3] Respondents' characterization of the practice of the court below prior to the decision of this case, Br. in Opp., at 14 & n.10, is sheer sophistry. They assert, for example, that the "exception" carved out by the court below to its general rule precluding consideration of issues raised initially on appeal is applicable only where "*the issue was raised by the party in a timely manner.*" Br. in Opp., at 14 (emphasis in original). The court below, however, has never engrafted onto this exception some sort of secondary "timeliness" requirement as suggested by respondents. Respondents understandably decline to address directly the relevance of the decision in *Linthicum*, *supra*, in which the court below raised *sua sponte* and decided an issue of statewide significance. Rather, respondents suggest that *Linthicum* and *Barrio* v. *San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984), are somehow irrelevant to establish the practice of the court below because the court itself, rather than the parties, raised for the first time the question ultimately decided. Those two very recent cases, however, illustrate the extent to which the court below has reached out to decide questions of "general statewide significance." Nothing in this Court's decision in *Barr* v. *City of Columbia*, 378 U.S. 146 (1964), suggests that a state court may avoid the *Barr* rule by deciding federal questions only it, rather than the parties, raises for the first time.

Respondents' suggestion, Br. in Opp., at 14 n.10, that the other cases relied upon by petitioner are distinguishable because the new arguments were raised at the "outset" of appeals to the court below puts a totally unsupported gloss on the court's exception. Under that gloss, questions of statewide significance may be raised for the first time on appeal, but only up to some unspecified point in the appellate process. Respondents do not support this unusual suggestion by citation to any decision of the court below. Respondents continually inject phraseology such as "after oral argument" in an apparent attempt to sug-

as importantly, the court below did not attempt to distinguish them when it refused to decide petitioner's federal questions. Rather, the court below, clearly recognizing the relevance of its historical practice, announced a new practice under which it would, in this case and henceforth, exercise absolute discretion to hear, or refuse to hear, questions raised for the first time on appeal. The historical practice of the court below is, standing alone, sufficient to establish the Court's power to decide petitioner's federal questions.[4]

Finally, and as respondents implicitly concede, Br. in Opp., at 13, the retention by the court below of absolute discretion to decline to hear an issue which it has the power to hear under its rules cannot strip this Court of

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gest that petitioner's presentation of its federal questions in its Supplemental Briefs is somehow different from presentation of a question by an appellant "before" oral argument. This is a red herring. On May 16, 1986 petitioner sought, and was subsequently granted leave, to brief these federal questions. The only oral argument ever held in this case in the court below occurred on May 1, 1986, and that oral argument went only to the question whether the court should grant review of this case. Petitioner's and respondents' supplemental briefs were filed as ordered by the court below and were before that court for more than seven months while this case was under consideration in that court.

[4] Respondents' repeated assertions, Br. in Opp., at 9, 14, that the jurisdictional posture of this case is identical to that of *Judy's Foods, Inc.* v. *A&B Food Services Corp.*, 798 F.2d 468 (6th Cir.), *cert. denied*, 107 S. Ct. 460 (1986), are meritless. As the Court was well aware in denying certiorari in that case, the Eighth Amendment question had been raised in the Sixth Circuit in a supplemental brief filed on the same day that that court summarily affirmed the judgment of the District Court. Here, petitioner briefed, with the court's permission, its federal questions more than seven months prior to the court's decision. Furthermore, petitioner in *Judy's Foods* did not indicate in this Court that it had filed a motion with the Sixth Circuit for leave to file that supplemental brief. The filing and grant of such a motion were required in order to bring petitioner's Eighth Amendment argument before that court because such a brief is not otherwise authorized to be filed by the Federal Rules of Appellate Procedure.

its jurisdiction over substantial federal questions under cases such as *Barr* v. *City of Columbia*, 378 U.S. 146 (1964), and *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).[5] In *Gosewisch* v. *American Honda Motor Co.*, ___ Ariz. ___, 737 P.2d 376 (1987), the court below once again exercised its newly announced, unfettered discretion to decide a point of state constitutional law raised for the first time on appeal. Applying its new rule in the context of an attack on the constitutionality of a jury instruction, the court decided this time to accept review:

> At trial, the only objection raised by Gosewisch to Honda's request was an alleged lack of evidentiary support. On appeal, Gosewisch asserts that the giving of an instruction pursuant to A.R.S. 12-683(3) violates article 18, section 5 of the Arizona Constitution.
>
> Honda argues that Gosewisch failed to timely object to the constitutionality of the jury instruction at issue. However, constitutional arguments are not necessarily waived by lack of objection in the trial court. *Questions of constitutional guarantees and violations thereof may be raised for the first time on appeal. Hawkins v. Allstate*

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[5] *Barr* requires that opposing litigants in the same case be treated evenhandedly. Yet, as petitioner documents, Pet. Cert., at 11, the jury's verdict in this case was reinstated only after the court below decided a question -- the excessiveness of the punitive damage award as a matter of state law -- that had not been presented by respondents in their Petition for Review. Respondents' only response to this point is their suggestion, Br. in Opp., at 20-21, that Question 3 as presented in their Petition for Review comprehended the question of the excessiveness of the award. Neither the language quoted by respondents nor any other pertinent language in their Petition for Review, however, bears out that suggestion. *See* Pet. Cert., App. 67a, 71a-72a. This discrimination against presentation of a federal question cannot be justified even under respondents' own professed understanding of the Court's decision in *Sullivan*. *See* Br. in Opp., at 13 n.9.

> *Ins. Co., Inc.*, 152 Ariz. 490, 493, 733 P.2d 1073, 1086 (Ariz. 1987) (consideration of constitutional issue raised for the first time on appeal is discretionary). We exercise our discretion to consider the constitutional issue presented by the petition for review.

737 P.2d, at 382 (emphasis added). The decision in *Gosewisch* confirms the existence of a rule of absolute discretion in Arizona which does not pass muster under *Barr* and *Sullivan*. *Gosewisch* also squarely refutes respondents' assertion, Br. in Opp., at 15-17, that petitioner "waived" certain of its Due Process Clause arguments because it did not interpose those arguments against the instructions given to the jury.

b. *Petitioner Did Not "Waive" Its Eighth Amendment Claim.* Respondents assert, Br. in Opp., at 7, that "petitioner deliberately chose not to raise its Eighth Amendment challenge at *any* stage below." (Emphasis in original.) This assertion is refuted by petitioner's argument to the court below that the reinstatement of the jury's verdict violated its rights under "the Due Process Clause of the Fourteenth Amendment and all other rights incorporated by that Clause, including the Excessive Fines Clause of the Eighth Amendment."[6] Motion for Reconsideration, *reprinted in* Pet. Cert., App. 53a.[7]

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[6] Respondents' "waiver" argument is especially curious in light of the fact that in their "Response to [petitioner's] Motion for Reconsideration," at 1, they took the position that petitioner's Motion for Reconsideration "is essentially a rehash of its arguments in its Supplemental Brief." Ten copies of that document have been lodged with the Clerk simultaneously with the filing of this Reply Memorandum.

[7] Respondents' "waiver" theory is based on their quotation, Br. in Opp., at 11, of part of a single sentence from petitioner's Supplemental Brief filed in the court below in which petitioner stated that it was relying on "the third-noted constitutional claim in *Lavoie* -- the due process argument." However, the Eighth Amendment, if applicable,

Furthermore, a majority of the Court has indicated that a litigant can never be viewed as having waived a "known right" prior to the Court's recognition of that right. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (plurality opinion of Harlan, J.); at 172 n.1 (Brennan, J., concurring, joined by White, J.). The decision in *Curtis* not only requires rejection of respondents' "waiver" argument but, as discussed in part 1.c. below, also establishes petitioner's entitlement to the benefit of any decision of the Court recognizing the applicability of the Eighth Amendment to punitive damage awards.

Finally, the record as a whole clearly demonstrates that petitioner and respondents briefed the substance of the question whether the Eighth Amendment applies to punitive damage awards in civil cases.[8] The question of the excessiveness of the $3,500,000 award was decided by the court below as a matter of state law by its application of the same general test as would be required by the Eighth Amendment. Respondents concede this point: an award must be "proportional to the gravity of petitioner's of-

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would be applied through the Due Process Clause of the Fourteenth Amendment and was therefore subsumed within the Due Process Clause argument. This point is confirmed by petitioner's Motion for Leave to File Supplemental Briefs and for Additional Oral Argument, at 5, in which the pertinent language in *Lavoie* is quoted with special emphasis placed by petitioner on the Excessive Fines Clause question as well as the Due Process Clause question. Ten copies of that document have been filed with the Clerk simultaneously with the filing of this Reply Memorandum.

[8] In its Supplemental Brief, petitioner briefed what it characterized as "the threshold question . . . whether punitive damages are, in essence, a criminal penalty." Supp. Br., at 37-39. Petitioner also expressly pointed out the gross disparity between punitive damage awards rendered in Arizona and the maximum monetary penalty for conviction of a felony in Arizona -- $150,000. Supp. Br., at 42. Respondents argued to the contrary in their Supplemental Brief, at 32-40, to which petitioner responded in its Supplemental Reply Brief, at 10. Ten copies of each of these briefs have been lodged with the Clerk simultaneously with the filing of this Reply Memorandum.

fense" and it must not "deprive[] petitioner of its means of livelihood." Br. in Opp., at 19. Indeed, respondents maintain that "[b]ecause the Arizona Supreme Court applied this test as a matter of common law, . . . acceptance of petitioner's [Eighth Amendment] argument would not dictate a different result in this case." *Id.* While petitioner disagrees with respondents' legal conclusion, there is no doubt that this question was aired below and that it is fit for resolution by the Court in this case. *See, e.g., New York ex rel. Byrant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) ("if the record as a whole shows . . . by clear intendment [that the federal question was presented], the claim is to be regarded as having been adequately presented."); *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982) (the Court's jurisdiction "does not depend on citation to book and verse.")

c. *Petitioner Is Entitled to the Benefit of Any Decision of this Court Applying the Eighth Amendment to Punitive Damage Awards.* Relying on their "waiver" theory, respondents, Br. in Opp., at 29 n.26, do not expressly disagree that petitioner would, absent a "waiver," be entitled to the benefit of any decision of the Court holding the Eighth Amendment applicable to punitive damage awards. Petitioner's entitlement to the benefit of a favorable ruling on the Eighth Amendment question is firmly grounded in cases such as *Curtis, supra,* in which a majority of the Court held that the failure of counsel to anticipate a major constitutional decision "cannot prevent a litigant from later invoking such a ground." 388 U.S., at 143 (plurality opinion of Harlan, J.); at 172 n.1 (Brennan, J., concurring, joined by White, J.). In this case, counsel for petitioner recognized and brought to the attention of the court below the potential significance of the pertinent portion of this Court's decision in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S.Ct. 1580 (1986), less than four weeks after *Lavoie* was handed down and more than nine months before this case

was decided. Petitioner brought the Court's notation of probable jurisdiction in *Bankers Life* to the attention of the court below in its Motion for Reconsideration only eleven days after the Court had taken that action. *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987). As the Court made clear in *Butts*, its rules regarding proper presentation of federal questions in the lower courts requires no more.

2. **The Urgent Need for Resolution of the Questions Presented.** Respondents argue, apparently in the alternative, that there is "no urgent reason" for the Court's decision of the questions presented by this case because, on the one hand, some have already been decided against petitioner's position by various lower courts, Br. in Opp., at 18, 21-22 & n.16, and because, on the other, some have not been addressed at all by lower courts and should be developed more fully in those courts, *id.*, at 28. However, the need for the Court's speedy resolution of these questions was recognized by this Court in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The proposition underlying all four of the questions presented herein is that governmentally sponsored and enforced systems for imposing large monetary fines -- punitive damages -- for the purposes of punishment and deterrence are subject to the constraints of the federal constitution which have historically been applied to other forms of governmentally sponsored and administered punishments imposed after criminal and, in some instances, civil, proceedings. If this Court would ultimately sustain this proposition, then punishment is currently being imposed on a daily basis and a massive scale throughout the United States in an unconstitutional manner. Such widespread disregard for fundamental constitutional rights would surely be intolerable.

Finally, if as respondent argues, Br. in Opp., at 18, the central proposition underlying petitioner's questions "is directly contrary to this Court's prior decisions," then there is "little point in requiring a litigant [such as petitioner]

to request a state court to overrule or modify one of this Court's precedents." *Illinois* v. *Gates*, 462 U.S. 213, 251 (1983) (White, J. concurring).

CONCLUSION

Respondents' arguments cannot eclipse the overriding fact that petitioner raised federal constitutional questions characterized by this Court as "important" promptly after learning of this Court's pronouncement. They were raised in briefs filed with the explicit, advance permission of the court below. That court had over seven months fully and thoroughly to consider the arguments of petitioner and respondents and the power under its rules to do so. That the court below declined to consider these important issues cannot deprive petitioner of the right to present them here or the power of this Court to decide them in this case.

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Respectfully submitted,

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